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LAW REPORTS.

Under the Superintendence and Control of the
INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND
AND WALES.

Indian Appeals :

BEING

CASES

IN

THE PRIVY COUNCIL

ON APPEAL FROM

THE EAST INDIES.

REPORTED BY HERBERT COWELL, ESQ.,
OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

VOL. IX.—1881-82.

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ERRATA.

CASES

IN

THE PRIVY COUNCIL

ON APPEAL FROM

The East Indies.

HURRO DOORGA CHOWDHRANI . . .	DEFENDANT ;	J. C.*
AND		
MAHARANI SURUT SOONDARI DEBI . . .	PLAINTIFF.	1881 <u>Nov. 8.</u>

ON APPEAL FROM THE HIGH COURT AT BENGAL.

*Mesne Profits— Interest on Mesne Profits Year by Year—Execution of Decree—
Costs.*

Mesne profits and the interest thereon are two distinct subjects. The former include the amount which may have been received from land, deducting the collection charges. The loss of interest year by year thereon is merely damages sustained by a Plaintiff who has been prevented from receiving the profits as they became due.

The Court, in execution, cannot exceed the terms of the decree by awarding interest year by year.

Costs disallowed, untenable grounds of appeal as to the amount of mesne profits having been put forward in order to bring the case within the rule as to value which authorizes an appeal as of right.

APPEAL from a decree of the High Court (Nov. 22, 1878), modifying in favour of the Respondent an order of the Subordinate Judge of *Mymensing* (June 17, 1878), whereby it was ordered that

* *Present* :—SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

J. C. Rs. 13,359 be accepted as the amount of mesne profits of certain
 1881 lands which had been decreed to the Respondent. The sum
 awarded by the High Court was Rs. 19,104.

HURRO
 DOORGA
 CHOWDH-
 RANI
 v.
 MAHARANI
 SURUT
 SOONDARI
 DEBI.

There were concurrent judgments as to the amount of mesne profits; but the High Court, in cross appeal by the Respondent, added thereto interest year by year at 6 per cent.

The judgment of the High Court (*Morris and Prinsep*, JJ.) was as follows:—

“A cross appeal has been preferred by the decree-holder. It is to the effect that the lower Court has acted upon a wrong principle in assessing the mesne profits; that it has simply added together the totals of the rents which the Ameen has found to have been paid in each year to the judgment debtor by the ryots, and not taken into account the loss which the judgment creditor has sustained during the long period of dispossession. In support of his argument the duruhdda refers to the judgments of this Court, to be found in 14 *Suth. W. R.* p. 151, 17 *Suth. W. R.* p. 228, and 19 *Suth. W. R.* p. 87, the effect of which is, that not merely the bare rental of each year, less the collection charges, is to be ascertained, but the actual loss which the party ousted has sustained, by not having the use of his money during the period that he is kept out of possession.

“The reply made to this objection is, that the decree does not permit any interest upon mesne profits until after those mesne profits have been ascertained, and that this is simply an application to have mesne profits at compound interest. Looking at the decree, it appears that it only allows interest upon the consolidated sum arrived at by the Court as mesne profits, after such mesne profits have been ascertained. There is no reason, however, why the Lower Court, in assessing the mesne profits, should not have allowed interest upon each year's rent as compensation for the loss of the money. We think therefore that the contention of the decree-holder in this cross appeal is right, and that the principle laid down in the 14 *Suth. W. R.* and other decisions of this Court, ought to have been followed. The judgment creditor, who has been kept out of possession, is entitled not merely to bare rental but to compensation for the loss he has sustained. Under ordinary circumstances, therefore, if the decree-holder has been kept

out of possession for several years, interest should be calculated at the end of each year upon the rental which he would be entitled to receive, and could receive, from the ryots for that year. In the present instance, where the dispossession extends over eight years, interest should be charged for seven years on the aggregate of the rents received or realizable the first year; for six years on the rents received or realizable the second year, and so on; and thus the aggregate of these sums should constitute the mesne profits which it was the duty of the Lower Court to ascertain and determine. Interest upon this consolidated sum would then run as provided for in the decree. It may be a question how far the definition of mesne profits, was given in sect. 211 of the new *Civil Procedure Code*, is in accordance with the decisions of this Court above referred to. But we do not think it necessary to enter upon this point, as the present case undoubtedly falls under the provisions of the old Code.

“The decree therefore of the Subordinate Judge will be amended in this respect, in that on the sum ascertained by the Ameen as the assets, less collection charges, derived each year from the estate, interest at 6 per cent, per annum will be allowed. Interest will be calculated upon each year’s mesne profits up to the date of the decree of the Lower Court, and interest upon the consolidated sum from that date to the date of realization.”

Cowie, Q.C., and *Cowell*, for the Appellant, contended that this judgment was wrong, and that interest year by year could not be granted in execution where the decree was silent in regard to it. The case relied upon by the High Court, *Protap Chunder Borooah v. Ranee Surno Moyee* (1), was in regular appeal, and moreover disallowed such interest because it had not been claimed in the plaint. Reference was made to sect. 11 of Act XXIII. of 1861; *Sadasiva Pillai v. Ramalinga Pillai* (2); *Sokhee Monee Debia v. Brijoraj Mookerjee* (3); *Chowdhry Wahed Ali v. Mussumat Jumaye* (4); and as to the meaning of “ascertainment” to *Doorga Soondaree Debia v. Shibessuree Debia* (5).

(1) 14 Suth. W. R. 151.

(3) 17 Suth. W. R. 228.

(2) Law Rep. 2 Ind. Ap. 219.

(4) 19 Suth. W. R. 87.

(5) 10 Suth. W. R. 391.

J. C.

1881

HURRO
DOORGA
CHOWDH-
RANI

v.
MAHARANI
SURUT
SOONDARI
DEBI.

J. C.
1881
—
HURRO
DOORGA
CHOWDH-
RANI
v.
MAHARANI
SURUT
SOONDARI
DEBI.
—

Doyne, for the Respondent, contended that the High Court was right, and that mesne profits included interest year by year in the manner directed by that Court. Reference was made to *Juggomohun Ghose v. Manick Chand* (1); *Hogg v. Dinonath Sreemanee* (2). Upon the question of costs, he contended that the total interest in question was not up to the appealable amount, and that the Appellant had questioned the correctness of concurrent judgments as to the mesne profits in order to obtain an appeal upon the matter of interest.

The counsel for the Appellant were not called on to reply.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK :—

The Respondent in this case was the Plaintiff in the Court below. She sued the husband of the present Appellant to recover possession of certain lands together with the sum of Rs. 3,647 10s. 9p., the estimated amount of mesne profits for two years ten months and twenty days from the 1st Assin 1273, to 20th Srabun 1276. In that suit a decree was made for the Plaintiff to recover possession of the lands, and also the mesne profits, not from a time previous to the date of the suit, as claimed, but from the date of the suit to the date of recovery of possession, to be ascertained by inquiry at the time of the execution of the decree, with interest from the date of the ascertainment at 6 per cent. per annum. From that decree there was an appeal to the High Court. The High Court, by its decree, amended the decree of the Lower Court by giving the mesne profits from the 1st Assin 1273, to the 20th Srabun 1276, in addition to those which had been awarded by the Lower Court. The High Court also stated that the mesne profits were to be recovered with interest from the date of ascertainment. Therefore, according to both decrees, the mesne profits were to carry interest only from the date of ascertainment. It is clear that the Court in executing the decree, could not vary or add to it by awarding anything beyond that which was originally decreed. When the decree

(1) 7 Moore's Ind. Ap. Ca. 263.

(2) 8 Suth. W. R. 447.

came to be executed it was referred to an Ameen to ascertain the amount of mesne profits, and he ascertained what was the rent which might have been obtained from the estate. That he treated as the mesne profits of the estate, but he added no interest year by year upon the amount. The mesne profits so ascertained amounted to Rs.13,359 and some odd annas, and the Lower Court made an order in execution for that amount. Upon that there was an appeal to the High Court by both parties, first on the ground that the assessment was excessive; and secondly, on the part of the Plaintiff, that in assessing the mesne profits the Court below ought to have allowed interest year by year upon the amount which could have been collected, and further interest upon the aggregate amount from the date of its order. The High Court upon that appeal having heard the argument of counsel, thought that the Lower Court was wrong in not having allowed interest upon the rental year by year, upon the ground that the decree holder was entitled, not merely to the rental less the collection charges, but also to interest thereon year by year as compensation for the loss he had sustained by not having the use of his money during the period he was kept out of possession. The question is, whether the High Court, which by its decree was merely executing the original decree of the High Court, did not by giving that interest really add to and alter the decree which was to be executed. Now that depends really upon the question what was the meaning of the term "mesne profits."

In their Lordships' opinion, the amount which might have been received from the land, deducting the collection charges, was the profits of the land. The loss of interest year by year upon those profits was merely damages sustained by the Plaintiff in consequence of her having been prevented from receiving the profits as they became due. But the original decree did not award those damages, and the High Court by awarding them added to the decree which was in the course of execution.

Several cases were cited to shew that the High Court was right in giving interest year by year, and several of those cases were referred to by the High Court themselves in their judgment. Amongst others a case was cited from the 14th *Weekly Reporter*, p. 151. When that case comes to be examined it will be found

J. C.

1881

HURRO
DOORGA
CHOWDH-
RANI

v.
MAHARANI,
SURUTSOON-
DARI DEBI.

J. C.
1881
—
HURRO
DOORGA
CHOWDH-
RANI
v.
MAHARANI
SURUTSOON-
DARI DEBI.
—

that it was not an appeal from a decree in execution, but from a decree in an original suit ; and in that appeal it was contended that the Lower Court ought in the original suit to have given the Plaintiff a decree, not only for the mesne profits, but for interest upon those mesne profits to be calculated from year to year. The High Court in that case thought that, under certain circumstances, a Plaintiff might be entitled to interest upon mesne profits from year to year ; but they said that, inasmuch as that interest had not been claimed in the suit, they could not interfere in the case, and the Plaintiff merely recovered the mesne profits without interest. That is a very different case from the present. There it was contended that the original decree of the Court ought to be altered ; here it is contended, not that the original decree of the Court ought to be altered by awarding interest year by year, but that the decree of the High Court in the execution of the case, in awarding such interest, was in accordance with the original decree. The case cited, however, is an authority to shew that it was not so ; for in that case the mesne profits and the interest thereon were treated as two distinct subjects, and the Court refused to allow the interest as well as the mesne profits, because the loss of the interest had not been claimed as damages.

If the present contention is correct, the term mesne profits in that case included interest thereon year by year, although the Court refused to allow it. It appears to their Lordships that the decision of the Lower Court in executing the decree was in accordance with the decree, and that the decision of the High Court by adding the interest from year to year exceeded the original decree.

Under these circumstances their Lordships think that the decree of the High Court ought to be reversed.

It appears that the total amount which the High Court has given by way of interest in excess of the decree is Rs. 5744. If that had been the only objection the case would have been under the appealable value ; but the Appellant, in order to gain a *locus standi*, appealed also upon the ground that the amount awarded for mesne profits was excessive ; and the greater portion of the Record, about 240 pages, relates to that part of the case, upon which there was no chance of the Plaintiffs succeeding. The

decisions of the Ameen, of the Lower Court, and of the High Court were concurrent with reference to that point. The only possible ground of appeal was that the court had allowed interest from year to year.

• Their Lordships cannot encourage the joinder of grounds of appeal which are absolutely untenable with grounds which are tenable in order to bring a case within the rule as to value which authorizes an appeal as of right. In the present case the effect of so doing has been a large increase of costs to the Respondent. The Appellant has thereby disentitled herself to the benefit of the rule under which a successful appellant is ordinarily entitled to the costs of the appeal.

Their Lordships will therefore humbly advise Her Majesty to reverse the decree of the High Court, but they make no order as to costs.

Solicitors for the Appellant : *Barrow & Rogers.*

Solicitor for the Respondent : *T. L. Wilson.*

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 AND
 MUSSUMAT LALLI BEGUM AND OTHERS . PLAINTIFFS.
 ON APPEAL FROM THE CHIEF COURT OF THE PUNJAB.

Mahomedan Law—Legitimacy—Implied Recognition—Pensions Act (XXIII. of 1871), s. 6—Certificate.

According to Mahomedan law the acknowledgment and recognition of children by a father as his sons gives them the status of sons, capable of inheriting as legitimate sons.

Such an acknowledgment may be either express or implied, in the latter case the inference from the acts of the father must depend upon the circumstances of each particular case.

Held, that a suit relating to a grant of property within the meaning of the Pensions Act (XXIII. of 1871) need not be dismissed because no certificate has been obtained before the commencement thereof: sect. 6 according to its true construction authorizing its continuance.

APPEAL from a decree of the Chief Court of the *Punjab* (Dec. 5, 1876), affirming with modifications a decree of the Commissioner of *Lahore* (Jan. 19, 1874).

The facts of the case appear in the judgment of their Lordships.

Cowie, Q.C., and *Graham*, Q.C. (*Doyne* with them), for the appellant.

Leith, Q.C., and *Mayne*, for the respondents, were not called upon.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH:—

This appeal arises in an action brought by *Mussumat Lalli Begum*, claiming in her own right as widow of the late Nawab of *Kurnal*, *Ahmed Ali Khan*, and as guardian on behalf of her

**Present*:—SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

minor sons, *Rustam Ali Khan* and *Umar Daraz Ali Khan*, to recover her own share as widow, and the shares of her minor sons who are alleged to be sons of the late Nawab, in large landed estate and other property left by him. The Defendant in the action is Nawab *Azmat Ali Khan*, who is the undoubted son of the late Nawab and much older than the two minor Plaintiffs.

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The late Nawab had four wives. A son, *Rahmat Ali Khan*, died in his lifetime. He left surviving him *Azmat Ali Khan*, the Defendant, the *Mussumat Lalli*, who asserts that she was his wife and is now his widow, and the two minor Plaintiffs.

In the Courts below several judgments original and on remand have been given, and the result of the litigation appears to be as follows :—The Commissioner of *Lahore* found that neither *Mussumat Lalli* nor her sons were entitled to inherit, being of opinion that she was never married to the Nawab, that her sons were not originally legitimate, and further that the status of sons had not been conferred upon them by the late Nawab by any recognition of them as his sons. On remand the Commissioner found that by family custom widows did not inherit. The Chief Court of the Punjab agreed with the finding of the Commissioner as to this custom, and dismissed the *Mussumat's* appeal on the ground that she was disentitled by the custom. The Commissioner also, as already observed, dismissed the suit of the sons. The Chief Court of the Punjab reversed his decree so far as it dismissed the suit of the sons, and decreed in their favour, being of opinion that the minor Plaintiffs were entitled to inherit. No question now arises as to the widow, both Courts having found that she is excluded by the custom of the family ; and she does not appeal from those decisions.

The issues raised as to the right of the minor Plaintiffs to inherit originally involved the following questions :—First, the alleged marriage of their mother *Mussumat Lalli*, with the late Nawab ; secondly, the alleged acknowledgment and recognition of them by the late Nawab as his sons, and the legal consequence of such recognition if made ; and thirdly, the existence of certain family customs.

It will be convenient in the first place to refer to the issues as

J. C. to the customs of the Mandals, to which this family belonged, to
 1881 see if any custom has been established varying the general rule of
 the Mahomedan law relating to inheritance or the effect of the
 NAWAB acknowledgment of a son. An attempt was made to shew that by
 MUHAMMAD the custom of the Mandals the sons of ignoble wives did not
 AZMAT ALI inherit. It appears that in 1849 an inquiry was instituted by
 KHAN the Government respecting the customs of the Mandals, and
 v. various dustur-ul-amuls were drawn up by members of Mandal
 MUSSUMAT families respecting them. But on consideration of these docu-
 LALLI ments, it appears first, that they do not agree on important
 BEGUM. points; and further, they do not profess to record existing
 customs, except possibly with regard to the exclusion of women
 from inheritancy, but contain endeavours to come to an agreement
 with respect to the rules which should bind the family in the
 future. This was the view taken by the Government at the time
 and also by both the Courts in *India* in this suit of these docu-
 ments, so far as they related to the inheritance of sons. On a
 remand by the Chief Court oral evidence of the custom was taken
 by the Commissioner. The evidence satisfied the Commissioner,
 and the Chief Court agreed with him, that the custom to exclude
 widows from a share of the inheritance was proved. The claim
 of the widow was therefore rejected. With respect to the sons
 the Commissioner's judgment is to this effect: he finds distinctly
 upon the question which was referred to him by the judgment re-
 manding the case that legitimate ignoble sons would take a share
 with noble sons; that there is no distinction as to the right to
 inherit between the sons of noble and ignoble wives. But in the
 course of his judgment he finds an issue to be proved which does
 not appear to have been referred to him. He says this: "They
 agree"—that is the dustur-ul-amuls and the oral evidence agree—
 "that illegitimate sons of ignoble mothers, though recognised as
 sons, get no share." Their Lordships have been referred to the
 evidence on which this last finding rests; but the learned counsel
 for the Appellant did not prosecute the consideration of it after a
 few witnesses had been referred to, because it soon appeared that
 the evidence afforded no foundation upon which the learned Com-
 missioner could properly base his finding, and the Judges of the
 Chief Court have distinctly come to a different conclusion upon it.

His finding that legitimate ignoble sons get a share with noble sons was however affirmed by the two Judges of the Chief Court, who both came after a very careful review of the evidence to the conclusion that no custom prevails in this family which varies the ordinary rules of the Mahomedan law with regard to the rights of sons to inherit.

An attempt has been made to shew that the family were originally Hindus and converts to the Mahomedan faith, and upon this foundation a suggestion has been raised that Hindu customs were preserved in the family; but the foundation for this suggestion entirely fails. Not only was the fact of the family having been at one time Hindus not proved, but it was negatived by some of the witnesses. Even if the fact had been proved it would only have lent probability to the suggestion that some Hindu laws had been preserved in the family as customs. It must still have been proved that they were in fact so preserved and acted upon; and as already stated, the proof of the existence of any customs so far as the present suit is concerned entirely failed, except as to the widow's right to share. It is to be observed also that there is evidence that the late Nawab was himself a strict Mahomedan. The rights of the minor Plaintiffs have therefore to be determined by the rules of Mahomedan law as applicable to the facts of the case.

The undisputed facts of the case are that *Mussumat Lalli* was originally a slave girl in the late Nawab's house, and at one time acted as a servant in it. She lived in the house up to the time of the Nawab's death, and beyond question the Nawab cohabited with her, and the two minor Plaintiffs were born in his house and remained in it up to the time of his death. Those facts are undisputed.

The questions which arise are first, whether there was a marriage between the late Nawab and *Mussumat Lalli* before the births of the Plaintiffs, in which case, of course, both would be his legitimate sons; and, secondly, whether, if that be not established, there is proof of an acknowledgment and recognition by the Nawab of the two Plaintiffs, as his sons, which would give them the status of sons and a title to inherit.

The direct evidence of the marriage is not very satisfactory,

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and is in some respects contradictory. Still, there is positive evidence that a ceremony of marriage did take place before the births of the children. That direct evidence is met by the negative evidence of witnesses who say that if such a ceremony had taken place they must have known of it. From this state of the evidence, if it stood alone, it would be difficult to affirm that a marriage had been established; but the evidence exists, and a question certainly arises whether the treatment of the minor Plaintiffs by the Nawab as his sons, to be hereafter adverted to, and the acknowledgments he made respecting them, do not afford such a strong presumption of marriage as to entitle the testimony of the witnesses who speak to the marriage to credit which otherwise it would not have possessed. Their Lordships, however, do not think it necessary to decide the case upon the ground that an actual marriage is proved. The Commissioner of *Lahore* has found against the marriage. The two Judges of the High Court certainly do not find against it. The inclination of Mr. Justice *Boulnois*' opinion was that it was not proved, whilst the inclination of Mr. Justice *Lindsay*'s opinion was the other way; they therefore did not find against the marriage, though they have not affirmed it. Their Lordships also do not find it necessary to pronounce a distinct opinion upon the question whether the marriage, in fact, took place, as they think the Plaintiffs are entitled to succeed upon the ground that acknowledgments of them as his sons by the Nawab have been proved.

The evidence of the acknowledgment of the elder son, *Rustam*, is extremely strong. It rests not only on oral testimony, but on documents, one of which is almost conclusive of the question. It seems that *Rustam* was born six or seven years before his father's death. His brother *Umar* was born shortly before his death,—the precise time is not ascertained,—probably about a year, or a little more; but it is not possible to arrive at the time with any exactness.

With regard to *Rustam*, it is shewn that he was treated by the Nawab as a legitimate son would be. He was often taken by his father on visits to houses of Mr. *Warburton*, a native of *India* but educated by an Englishman and a Government official, and of Major *Parsons*, another British officer, both living in the neigh-

bourhood. The Nawab appears to have introduced *Rustam* as his son, and the evidence is that he treated him with greater affection than his eldest son *Azmat*. Not only in the Nawab's house was *Rustam* put forward as his son, but he was taken on the above-mentioned and other visits as if he were a legitimate son. He was always dressed as a legitimate son would be. Mr. *Warburton* proved that he "used frequently to see *Rustam* going about well dressed, mounted on an elephant, and attended by servants." He also says he was extremely like the Nawab. A great deal of other evidence was given to this effect. Besides evidence of this kind, when *Rustam's* education was about to be commenced the Bismillah ceremony was performed. There is distinct evidence of the performance of that ceremony, not only by the native gentlemen who attended, but by Mr. *Warburton* and Major *Parsons*, who were also invited and attended. Mr. *Warburton* appears to have been an intimate friend of the late Nawab; he is a witness whose credit is entirely unshaken, and appears to be in every respect an unimpeachable witness. At this Bismillah ceremony *Rustam* was introduced and treated as the son of the Nawab. It is scarcely conceivable that this ceremony would have been performed if he had been an illegitimate son. With regard to the evidence of the defendant's witnesses as to the manner in which these children were treated, their Lordships think that it is entirely unworthy of credit. In opposition to the strong and credible evidence given by the witnesses for the Plaintiffs, it is attempted to be shewn that these children were, in fact, the children of a slave girl allowed to have promiscuous intercourse with men outside the Nawab's house, and whose fathers, some of the witnesses say, it was impossible to know. This evidence, and that which seeks to prove that the boys were treated as such children would probably be treated, seems utterley unworthy of credit.

In addition to the oral evidence which has been mentioned, a declaration, important in itself, and as affording confirmation of the oral testimony of the Plaintiffs, is found in the report which the Nawab made to the Government respecting the arms belonging to his family. In a letter to the Deputy Commissioner of

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Karnal, dated on the 7th of March, 1866, the year before he died, is a schedule in which the arms held by himself and the members of his family are described. The letter is :—" After expressing a desire for an interview which has abundant advantages, and is the best of the objects, be it known to your splendid and kind mind, on the arrival of your kind note a list of my personal arms is annexed to this friendly letter as required in Commissioner's circular dated 8th January, 1866." In that list there are columns with the names of the possessors and the descriptions of the arms. First there is " personal, " that is himself ; and he returns eleven native swords, one shield, muskets, pistols, and other arms. Then follows :—" The Nawab's son, *Azmat Ali Khan*," (the Appellant,) four native swords, one shield, two double muskets, and so on. Then follows ; "the Nawab's son *Rustam Ali Khan*" (the Respondent), four native swords, one shield, two double muskets, and so on. In this document the Nawab describes *Rustam* as " the Nawab's son, *Rustam Ali Khan*," and returns exactly the same number of arms as belonging to him as belonged to his eldest son. He therefore not only calls him his son, but treats him as he treated *Azmat*, his undoubted legitimate son. Their Lordships think that this acknowledgment in a formal report to the Government, is almost conclusive as regards *Rustam*.

Undoubtedly, the evidence of acknowledgment and recognition of *Umar* the youngest son is, as may naturally be expected, much less than that in the case of the elder brother. Considering the short period that elapsed between his birth and the death of the Nawab, it is not surprising that a paucity of evidence appears ; but their Lordships think that enough is shewn in the case of *Umar* also to satisfy them, as it satisfied the Judges of the Chief Court of the *Punjab*, that he was acknowledged and treated as a son.

The first witness for the Plaintiffs, *Nijabut Ali Khan*, who was a relation of the deceased Nawab gives evidence of an acknowledgment which, if true, goes far to support the claim of the younger son : " I often used to go to Nawab *Ahmad Ali Khan* and he often acknowledged to me that *Rustam Ali Khan* and *Umar Daraz Ali Khan* were his sons." No doubt the Commis-

sioner of *Lahore* has found that this witness and two other witnesses who speak of the marriage are not to be believed, because he considers that the marriage did not take place, and not believing them upon that point he did not give credit to them upon any other. Their Lordships are by no means sure that the Commissioner was not too sweeping in his condemnation of these witnesses because even if some discrepancies appear in their evidence as to the facts of the marriage, it may still be that they were speaking the truth when they said they were present at the ceremony. It is too common for witnesses in *India* to become partisans of the party for whom they are called, exaggerating facts, and adding incidents to transactions which really took place. But it is not always safe to disregard their evidence altogether because in some respects they may have said that which is not believed. If the case, however, had rested on this man's evidence, their Lordships agree with the learned counsel for the Appellant that it would have been, to say the least, unsafe to act upon it; but the evidence does not rest there. Mr. *Warburton*, the witness who has been already described and commented upon, gives evidence of what appears to be a distinct acknowledgment by the Nawab of *Umar* as his son. Mr. *Warburton* is examined at some length by both parties. He had excellent opportunities of knowing the state of the Nawab's family with accuracy. He visited the Nawab, was invited to the Bismillah ceremony of *Rustam* and was on intimate and confidential terms with the Nawab. He is asked: "Do you know anything about *Murdaraz Ali Khan*?—another name for *Umar*." (Reply.) Yes, I know *Murdaraz Ali Khan*; he is the reputed son of the late Nawab *Ahmed Ali Khan*—(Question 2.) Whenever you had occasion to see these two boys or either of them, in what dress did they generally appear? I mean, were they dressed in such costumes as the sons of Nawabs and native gentlemen were? (Reply.) Yes, they always appeared in clothes as usually worn by sons of Nawabs and native gentlemen.—(Question 3.) Did you see father and son in one place, and was then the treatment like that of a father? (Reply.) I do not recollect seeing *Murdaraz Khan* with his father; but I have frequently seen *Rustam Ali Khan* and his father at the same time, and his treatment of *Rustam Ali Khan* was that of a father

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J. C. The more specific evidence is at the end of his examination
 1881 and is in these terms. It is given in reply to a question
 — which was put to him in cross-examination. “To the best of
 NAWAB your recollection did Nawab *Ahmed Ali Khan* ever talk to you
 MUHAMMAD about *Rastam Ali*’s sonship; *i. e.*, did he ever acknowledge in
 AZMAT ALI your hearing, in distinct and solemn words, that *Rustam* or *Umar-*
 KHAN *Daraz Ali* was his son or legitimate son? (Reply.) I do not
 v. recollect having any conversation with the late Nawab as to the
 MUSSUMAT parentage of *Rustam Ali Khan*; but with regard to *Umar-daraz*
 LALLI *Ali Khan* I distinctly recollect that shortly after his birth Nawab
 BEGUM *Ahmad Ali Khan* came to my house and said that *Umar-daraz*
 — *Ali Khan* his son’s mother had no nourishment, and he was then
 advised to procure a sucking-bottle for the child. I do not recol-
 lect having on any other occasion heard the Nawab talk of *Umar-*
daraz Ali Khan as his son.” If that statement be true, and
 their Lordships are disposed to give credit to it, can there be any
 doubt that it was a distinct acknowledgment of this young boy by
 the Nawab as his son? It was made in the most natural way,
 and conveyed to Mr. *Warburton*’s mind the clear impression that
 he referred to and acknowledged *Umar* as his son. It is also im-
 portant to observe that *Umar* received the titular name of *Khan*,
 as his brother *Rustam* had, a name which it is not likely the
 father would have bestowed upon any but his acknowledged and
 legitimate sons. Those who advised the Appellant were appa-
 rently aware of the importance attached to this name, for they
 endeavoured to shew that it had not been given to the boys until
 after the death of the Nawab; that is distinctly disproved by the
 evidence in the case, and it appears that they always bore that
 name.

The evidence of Major *Parsons* is not so distinct as that of Mr. *Warburton*. He says, to the best of his recollection, the Nawab spoke himself to him about the second boy. Besides this testimony, there is general evidence that both boys were treated by the Nawab as his sons.

Undoubtedly an acknowledgment of each son must be proved. In the actual circumstances of this case, it is highly probable that when the Nawab had recognised the elder son of *Mussumat Lalli*, he would also acknowledge the younger, and this probability

gives support to the evidence in the case of the latter. There seems to be no reason for his making a distinction between them.

Their Lordships have already adverted to the unsatisfactory character of the evidence given on the part of the Defendant. The only piece of evidence entitled to weight is the genealogical tree which has been produced by him. That tree professes to be a pedigree of the Nawab's family which was returned to the Government. The genealogy begins, at no distant period, with the father and uncles of the late Nawab. He was asked for a genealogy of his family. Undoubtedly in the paper which has been produced there is under his own name an entry of two sons only, *Rahmat Ali Khan* "deceased," and *Azmat Ali Khan*; there is no mention of *Rustam*, though *Rustam* must have been born at the time that this pedigree was drawn up. It is, however, to be observed that the document produced is a copy only, and that the original has not been produced or satisfactorily accounted for. There may be considerable question whether the copy was admissible in evidence; but whether admissible or not, it is a copy only, and there is an entry after the name of *Rahmat Ali* of his death—" *Rahmat Ali Khan, deceased.*" Now, at the time that this pedigree was prepared, *Rahmat Ali Khan* was not dead; and therefore the document must have been altered, at least to that extent, after it had been originally prepared. It is possible that when the Nawab was called upon for his genealogy he might have thought it sufficient to give the genealogy only down to himself. But the document itself, the original not being produced, containing an entry which could not have been in a genuine original, cannot be safely relied upon. Even if an original pedigree had been produced without the name of *Rustam*, though it would no doubt be a piece of evidence favourable to the view of the appellant and perhaps strongly favourable to that view, it would not be sufficient to outweigh the positive evidence of the acknowledgment of *Rustam* by the Nawab.

Their Lordships, therefore, have come to the conclusion that an acknowledgment by the Nawab of both the minor Plaintiffs as his sons has been proved.

The only question which remains on this part of the case is as
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to the effect of these acknowledgments. Both the Judges of the Chief Court, who have given learned and careful judgments, have gone very fully into the authorities upon this question. Their Lordships however are relieved from a discussion of those authorities, inasmuch as the rule of Mahomedan law has not been disputed at the Bar ; viz., that the acknowledgment and recognition of children of a Mahomedan as his sons gives them the *status* of sons capable of inheriting as legitimate sons unless certain conditions exist, which do not occur in this case. That rule of the Mahomedan law has not been questioned at the Bar. In this case we have not only the treatment of the Plaintiffs by the Nawab as his sons, from which under certain circumstances an acknowledgment may be presumed, but we have actual acknowledgments of them. It has been decided in several cases that there need not be proof of an express acknowledgment, but that an acknowledgment of children by a Mahomedan as his sons may be inferred from his having openly treated them as such. The question whether the acknowledgment should be presumed or not must of course depend on the circumstances of each particular case in which it arises. The only authority, after the course which the argument has taken, to which their Lordships think it necessary to refer, is the case of *Ashrufood Dowlali Ahmed Hossein Khan v. Hyder Hossein Khan* (1). In that case their Lordships say : " The presumption of legitimacy from marriage follows the bed, and whilst the marriage lasts the child of the woman is taken to be the husband's child ; but this presumption follows the bed and is not antedated by relation. An antenuptial child is illegitimate.—A child born out of wedlock is illegitimate ; if acknowledged he acquires the status of legitimacy." The rule of the Mahomedan law as to acknowledgment is so affirmed in this judgment. " When therefore a child really illegitimate by birth becomes legitimated, it is by force of an acknowledgment express or implied directly proved or presumed. These presumptions are inferences of fact." This last passage appears to refer to cases where an express acknowledgment is not proved and has to be presumed from other facts. They are built on the " foundations of the law and do not widen the grounds of legitimacy

(1) 11 Moore's Ind. Ap. 113.

by confounding concubinage and marriage." These observations must be taken with reference to the facts of that case : and in that case it appeared that there was a Moottah marriage after the birth of the child. There was no acknowledgment and the treatment of the child was equivocal. Sometimes he was treated as a son and at others not ; and indeed by a deed executed by the father for that purpose he was distinctly repudiated by him as his son. In that case it was decided that in the absence of express acknowledgment, the evidence was insufficient either to raise the presumption of a marriage which in point of time would cover the birth of the child or of an acknowledgment. The facts and questions in that case were very complicated, and some of the passages in the judgment referred to by the Judges below can only be understood by referring to the questions to which they were addressed. However there really is no dispute about the law ; and their Lordships in this case have not to lay down any new principles of law, but only to apply a well-established principle to the facts.

The remaining point relates to a part of the property which is sought to be recovered. It appears that some part of the property in suit consisted of land which was assumed in the Courts below to be held under a grant from the Crown on terms which brought it within the *Pensions Act* (Act XXIII. of 1871). Their Lordships have not been referred very specially to the facts, nor was that necessary in the view taken by them of the construction of this Act : they are therefore not to be understood to affirm the assumption upon which the Courts below acted, that the grant in question is a grant within the *Pensions Act*. They give no opinion upon that point ; but assuming that the Court was right in considering the grant as one within the *Pensions Act*, their Lordships think it came to a correct decision in holding that when the certificate mentioned in the Act was obtained the suit might proceed. It seems that after the judgment which disposed of the principal questions in the case had been delivered final judgment was suspended upon an objection that no certificate had been obtained. Before the case was finally disposed of and the final decree passed, the certificate was obtained and delivered to the Court. The *Pensions Act*, by sect. 4, provides

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that: "Except as hereinafter provided, no civil Court shall entertain any suit relating to any pension or grant of money or land revenue conferred or made by the British or any former Government." Then the 6th section is, "A civil Court otherwise competent to try the same, shall take cognisance of any such claim upon receiving a certificate from such Collector." It is contended that the suit ought to have been dismissed altogether as regards the property held under the grant, because no certificate was obtained before the commencement of the suit; but their Lordships think that the Court, although up to a certain time they had proceeded apparently without objection with the suit without a certificate, was justified in going on with the suit when it was received. The statute says that: "A civil Court otherwise competent to try it"—this Court was competent to try it—"shall take cognizance of any such claim upon receiving a certificate from such Collector." When the Court received the certificate it was bound to take cognisance of the claim; and it seems to their Lordships that finding an existing suit when it received the certificate it might take cognisance of the claim in that suit. The decision on that point therefore seems to their Lordships to be correct.

The result is that the decree of the Chief Court of the Punjab should be affirmed; and their Lordships will humbly advise Her Majesty to that effect. The Appellant will pay the costs of the appeal.

Solicitor for appellant: *Watkins & Lattey.*

Solicitor for respondent: *T. L. Wilson.*

CHOORAMUN SINGH PLAINTIFF ;
 AND
 SHAIK MAHOMED ALI, BEBEE JEEAN }
 (HIS WIFE) AND AHMED KABIR (HIS SON) } DEFENDANTS.

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AND CROSS APPEAL BY AHMED KABIR.

ON APPEAL FROM THE HIGH COURT AT BENGAL.

Practice—Decree—Unnecessary Declarations—Costs.

A mortgagee holding two mortgages of the same property sells under the second mortgage to the Plaintiff, and subsequently under the first mortgage to his son benamee for himself :—

Held, in a suit against the mortgagee and the benameedars that the Plaintiff was entitled to set aside this second sale, and to redeem, but that, the mortgagor not being a party, the Court was wrong in introducing into the decree a declaration to the effect that the Plaintiff was entitled “as second mortgagee,” and had not acquired the equity of redemption belonging to the mortgagor.

Such a declaration should in appeal be struck out as embarrassing to the Plaintiff’s title, at the expense of the Respondent who resisted.

CONSOLIDATED APPEAL and cross appeal from an order of the High Court (March 28, 1879), reversing an order and decree of the Subordinate Judge of *Bhaugulpore* (June 1, 1877.)

The facts appear in the Judgment of their Lordships.

The suit in which the above orders were made was instituted by *Chooramun Singh* for a declaration and confirmation of his title in respect of a certain share of mouzah *Mafu*, by annulling an auction sale of the 23rd of October, 1876, held in execution of a decree purporting to have been obtained by the Defendant No. 2, the wife, based on a bond dated the 23rd of July, 1871, which was executed by one *Rughoobuns Sahai*, the original proprietor of the mouzah and the judgment debtor, in her favour, at which sale the Defendant No. 3, the son, became the ostensible purchaser. This sale the Plaintiff sought to set aside on the

* *Present* :—LORD BLACKBURN, LORD WATSON, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

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ground that it had been fraudulently brought about, was wholly illegal and of no effect, as against a prior auction sale of the same property held on the 1st of May, 1876, in execution of a decree wherein the principal Defendant (No. 1), was the decree holder, the judgment debtor being the same *Rughoobuns Sahai*, and the purchaser, the Plaintiff *Chooramun Singh*. The latter also sought a declaration that he was entitled as such purchaser to redeem the said mortgage bond of the Defendant No. 2, the wife, dated the 23rd of July, 1871.

The Subordinate Judge, although inclined to hold that the real person interested in all these transactions was the principal Defendant, and that the Defendants Nos. 2 and 3, were mere names, still came to the conclusion that the sale sought to be set aside ought to stand as a good and valid sale held in execution of a decree pending at the date the Plaintiff became the purchaser, and of which he had then notice, but even assuming that he had no such notice still his ignorance not being imputable to fraud on the part of the principal Defendant, the Plaintiff must suffer for his own negligence.

The Subordinate Judge therefore dismissed the suit.

The High Court on appeal (*Birch*, and *Romeschunder Mitter*, JJ.) took an entirely different view. They concurred with the Subordinate Judge in deciding that the names of Defendants 2 and 3, were used to suit the principal Defendant, who was alone the party really concerned in the several transactions. They held that the sale sought to be set aside was a collusive sale and wholly void; that the Plaintiff as the Purchaser at the first execution sale became the holder of a charge on the property to the extent of the purchase-money paid by him; and that he was entitled to redeem the said mortgage bond standing in the name of the Defendant No. 2, but that by his purchase the plaintiff did not acquire the equity of redemption which was vested in *Rughoobuns Sahai*.

The decree appealed against is as follows:—

“It is ordered and decreed that the decree of the Lower Court be reversed; and it is further ordered and decreed that the auction-sale held by the Subordinate Judge of *Bhaugulpore* on the 23rd of October, 1876, of the property (the subject of this

suit), viz., an undivided one-sixth share of mouzah *Mafu*, pre-gunnah *Maldah*, bearing towzi No. 3698 of the Collectorate of *Bhaugulpore*, in execution of the decree of the Subordinate Judge of *Gya*, dated the 6th of September, 1875, in suit No. 124 of 1875, wherein *Mussamat Bebee Jeeän* was Plaintiff and *Lala Rughoobuns Sahai alias Domi Lal*, was Defendant, be and the same is hereby set aside : and it is declared that the Plaintiff as the second mortgagee in respect of the said property, is entitled to redeem the first mortgage of the said Defendant *Mahomed Ali*, under the bond executed by the said *Lala Rughoobuns Sahai, alias Domi Lal*, in the name of the Defendant *Bebee Jeeän*, on the 23rd of July, 1871, regarding the said one-sixth share of mouzah *Mafu*. And it is further declared that the said Plaintiff has not acquired the equity of redemption regarding the said property belonging to the said *Lala Rughoobuns Sahai, alias Domi Lal*."

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Leith, Q.C., and C.W. Arathoon, for Chooramun Singh.

Doyne, for Ahmed Kabir.

The judgment of their Lordships was delivered by

LORD BLACKBURN :—

In this case there are two appeals, an appeal and a cross appeal. The circumstances under which the point upon which their Lordships have to express an opinion arises are these : A family, consisting of the father, the wife, and the son, are the three Defendants. They have been called Defendants one, two, and three ; but the expressions, "father," "wife," and "son," which have been used as most convenient, may be used here. There have been two bonds made creating a charge upon the estate. The first in point of date was in the name of the wife. She, on the face of the bond, was the lender of the money. The next in point of date was a bond in the name of the husband, the first Defendant. There was a third, also to him ; but that is not very material to consider. That being the state of things, these bonds were brought to judgment and execution. The first suit, instituted against the original grantor of the bonds, was that which was brought in the name of the wife upon the 7th of

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July, 1875. The second suit instituted was that which was brought in the name of the husband ; and that was instituted on the 24th of July, 1875, very shortly afterwards. The two came to judgment upon the same day, the 6th of September, 1875 ; and two judgments were given. As far as there was any question of priority the prior suit was the suit on the prior bond. The execution of the bond that was in the name of the wife had priority over the other ; but the execution which was first carried out to a sale, upon the 1st of May, 1876, was upon the bond which was second in point of date, which bond had been given in the name of the husband. It was upon that execution that a sale took place, and at that sale the Plaintiff became the purchaser. On the 23rd of October, 1876, some months afterwards, they proceeded to the sale under the execution which was first in point of date on the bond that had been in the name of the wife ; and on that sale the son became the purchaser. The question here is between the Plaintiff, the purchaser under the first execution, though under the second bond, and the purchaser under the second sale. The Plaintiff in substance brought his action to set aside the sale to the son, and to have himself declared the purchaser ; he expressly stating in his plaint that he claimed it as purchaser, and to be entitled to redeem. He did not say that the bond debt to the father and husband on the second bond was prior in date ; all that he claimed was that, under the circumstances of the case, he should be entitled to redeem. The original grantor of the bonds was no party to the suit, and was not in any way brought before the Court. That being the state of things, and there being a great many phrases about fraud and other matters of that sort, the Plaintiff's contention was that in fact, though there were the three names used, and though it was said that the money was lent by the wife on the first bond, and that the son was the purchaser under the sale, yet in reality the father was the party all through ; that it was the father who had lent the money in the name of his wife ; and that it was the father who had purchased in the name of the son. That was really and truly the contention ; and on that contention of fact both the Judge of the Inferior Court, and the Judges of the High Court upon appeal, have found in favour of the Plaintiff. They found that the husband or father was

merely using the names of the others, because the three, the husband, the wife, and the son, were living joint in family together; and though some evidence was called to shew that the wife had a separate estate, and that she might have been the lender of the money, there was no evidence whatever attempted to be given to shew that the son had any separate estate, or that he purchased, or that the son, in fact, was anything else but what the Plaintiff alleged him to be. Their Lordships think that, both the Inferior Court and the Supreme Court having decided that question of fact without any apparent difficulty or doubt, they should not further enter into the question as to whether it were so or not, especially as it rather appears as if, upon further entering into the question, there would be very strong grounds for their Lordships coming to the same conclusion as that at which the Courts below arrived. When once it is established, as their Lordships now take it to be, as a fact to start with, that the purchase under the second sale was by the Defendant, the husband or farther, himself, who had himself caused the first sale to take place and then purchased under the second sale, it is quite clear that that could not stand against the purchaser under the first sale and it is clear that it must be set aside. The High Court in altering the judgment of the Court below, say that being so, it must be set aside, and the Plaintiff is entitled to redeem. But then, unfortunately, the Court, strongly impressed with the fact that the original mortgagor might have been ill-used or might have some claim, went on to declare something favourable to the original mortgagor, who was not before the Court at all, and which might very possibly embarrass the Plaintiff in his title. Accordingly, he complains that when they made their decree they put in unnecessary matters. The decree as actually drawn up would be all right until it comes to "be and the same is hereby set aside." Then, as it stands at present, it goes on, "And it is declared that the Plaintiff, as the second mortgagee in respect of the said property, is entitled to redeem the first mortgage of the said Defendant, *Mahomed Ali*." It seems to their Lordships that it was quite unnecessary and irrelevant to say whether it was as a second mortgagee or whether it was as a purchaser. It may be that the original grantor of the bond might be induced to make out some

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case or other that there was *res judicata* in his favour on these words, and consequently their Lordships think that those words, "as the second mortgagee in respect of the said property," should be struck out. It then goes on to the end of the sentence, as to which there is no objection ; and then it says, " And it is further declared that the said Plaintiff has not acquired the equity of redemption regarding the said property belonging to the said *Lala Rughoobuns Sahai*, alias *Domi Lal*." Now that is a question which, if raisable at all, as to which their Lordships express no opinion, can be raised only by *Lala Rughoobuns Sahai*, and has nothing to do with this suit. That declaration, therefore, ought also to be struck out. That is really the only alteration. In every other respect the decree of the High Court seems to be perfectly right. In those respects it should be altered.

The cross appeal is upon the question of fact which has already been mentioned. It is brought by the son, who also opposes the first appeal. The son's case upon the cross appeal is that he was not merely benamee for his father ; but he produces no evidence, nor does he shew that any evidence ever was produced, to shew that he was not a mere name. Both the courts below have thought that he was so ; and consequently he fails on that. The result is that the decree stands, with the alteration mentioned, and the cross appeal is dismissed.

There remains only one other question, what is the effect on the costs of the litigation ? The general rule is, that where an Appellant succeeds he gets the costs of the appeal, and that where a Respondent succeeds he gets the costs. The question now is, whether there is any ground for altering that general rule. The cross appeal, which is brought on the question of fact, and which the Appellant was fully entitled to oppose, has been decided against the cross Appellant and in favour of the original Plaintiff: and no reason whatever can be suggested why it should not be with costs. As to the first appeal the matter is not quite so clear. The alteration made is leaving out a portion of the decree of the Court below, which it seems was quite unnecessary, and which their Lordships think the Plaintiff had a right to complain of and to get rid of as embrassing to his title. The question is, whether or no there may be some plausible grounds for saying

that that should not be done at the expense of the Respondent. The Respondent appeared and resisted it. Their Lordships are of opinion that there are no grounds for excepting this case from the operation of the general rule and that the general rule should prevail.

The result is that their Lordships will humbly advise Her Majesty that the decree of the High Court should be altered in the manner already mentioned, and that the cross appeal should be dismissed, and that both should be with costs to the Plaintiff.

Solicitor for Appellant : *T. L. Wilson.*

Solicitors for Respondent : *Ahmed Kabir : Hendersons & Co.*

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Jan. 13.
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ON APPEAL FROM THE HIGH COURT AT BENGAL.

Act XL. of 1858, s. 3—Guardianship—Power of Manager in respect of Infant Co-sharers.

The manager of an estate is not the guardian of infant co-proprietors of that estate for the purpose of binding them by a bond, or of defending suits against them in respect of money advanced with reference to the estate, unless he has obtained a certificate of administration under Act XL. of 1858, s. 3.

APPEAL from an order of the High Court (Aug. 7, 1879), which modified an order of the subordinate Judge of *Bhagulpore* (Feb. 8, 1877). The case in the High Court is reported in 17 *Suth. W. R.* 237.

The Respondents as minors sought for a declaration that a certain decree which the Appellant had recovered against their uncle *Sheo Nundun Singh*, on his own behalf, and also as their guardian, being the eldest male member of a joint Hindu family,

**Present:—*LORD BLACKBURN, LORD WATSON, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

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ought not be executed against their property, on the grounds that the debt contracted by their ancestors for which the decree was obtained was not contracted for legal necessities, and was not binding on them, that their uncle was not their properly constituted guardian, and that in the suit in which the decree was so obtained against them they were not properly represented.

For the defence it was urged that the debt for which the decree was recovered was an ancestral debt incurred on a running account and on several adjustments thereof made from time to time by different members of the joint family, acting as the managers and kurtas for the others according to the usual custom in joint Hindu families; and that these debts were principally incurred for the payment of Government revenue, necessary, and legal expenses, religious obsequies, and social observances.

The Subordinate Judge was of opinion that the debt had not been contracted for any pressing necessity, nor for the benefit of the minor's estate; that the Appellant did not inquire as to the existence of any necessity for the advances; and that in the suit which culminated in the decree the minors were not properly represented. An order was therefore made that the decree was not to be executed against the minors' shares.

The High Court so far modified this order as to declare that the minors were liable for so much of the debt as was due when their father *Lalji* died. That debt, being the debt of a joint Hindu family, the minors were responsible for their quota thereof.

Doyne, Q.C., and *Arathoon*, for the Appellant.

Graham, Q.C., and *Woodroffe*, for the Respondents, were not called upon.

The authorities cited were *Hanumanpershad v. Mt. Baboojee* (1), and *Mayne's* Hindu law, Ss. 264, 5, 9.

The judgment of their Lordships was delivered by
SIR BARNES PEACOCK :—

This is an appeal from a judgment of the High Court in a suit brought by the Respondents, who are infants, in the name of their

guardian, against the Appellant, in the Court of *Bhagulpore*. The object of the suit was to prevent the Appellant from executing a decree which he had obtained against the Respondents. The case arose in this way: The Plaintiffs and *Sheo Nundun* and *Hur Nundun*, were members of a joint Hindu family, and joint proprietors of an ancestral family estate situate in the district of *Bhagulpore* and subject to the Mitakshara law. The suit in which the decree was obtained was brought on a bond, dated the 21st of April, 1870, for Rs.16,348, executed by *Hur Nundun* on behalf of himself and as uncle and guardian of the present Plaintiffs. *Hur Nundun* was not at the time when he executed the bond the guardian of the present Plaintiffs, or at any time the manager of the estate; the elder brother, *Sheo Nundun*, after the death of *Lalji*, the father of the present Plaintiffs, was the manager. The suit in which the decree about to be executed was obtained was brought against *Sheo Nundun* and the present Plaintiffs. The present Plaintiffs being minors, the suit was stated to be brought against *Sheo Nundun* as heir of *Hur Nundun*, and against the present Plaintiffs under the guardianship of *Sheo Nundun*, and *Mussamat Ghuneshyam Konwari*, mother and guardian of the minors. It turned out that the mother was not the guardian; that although a certificate of guardianship had been granted to the mother, that certificate had been set aside, and that the mother really was not the guardian. An *ex parte* decree was obtained against the Defendants; but the mother came in and asked to have the decree set aside upon the ground that no notice had been served upon her. The Court ordered that the case should go down for another trial, but upon the second trial the Judge who tried the case struck out the name of the mother and did not allow her to appear as the guardian of the infants. The suit was decreed against *Sheo Nundun Persad* and the Plaintiffs for the total amount of the bond, with interest. The Plaintiffs contend that that decree was not binding upon them, inasmuch as they were infants at the time, and were not represented by a guardian. On the other hand, it is contended that *Sheo Nundun Persad*, who was named as guardian in the suit, was their guardian, he being the co-proprietor and manager of the estate. It is clear that the manager of an estate although he may have the

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power to manage the estate, is not the guardian of infant co-proprietors of that estate for the purpose of binding them by a bond, as *Hur Nundun* did, or for the purpose of defending suits against them in respect of money advanced with reference to the estate. Act XL. of 1858, passed for making better provision for the care of the persons and properties of minors in *Bengal*, enacted, sect. 2, that, "except in the case of proprietors of estates paying revenue to Government, who have been or shall be taken under the protection of the Court of Wards,"—which does not apply to this case,—“the care of the persons of all minors (not being European British subjects), and the charge of their property, shall be subject to the jurisdiction of the Civil Court.” That shews that *Sheo Nundun Persad*, although he was a co-proprietor and manager of the estate, was not the guardian of the infants, who, according to the Act, were subject to the jurisdiction of the Civil Court. Then sect. 3 enacts that “Every person who shall claim a right to have charge of property in trust for a minor under a will or deed, or by reason of nearness of kin or otherwise, may apply to the Civil Court for a certificate of administration; and no person shall be entitled to institute or defend any suit connected with the estate of which he claims the charge until he shall have obtained such certificate.” No certificate was obtained by *Sheo Nundun Persad*; and although it is stated that he was the guardian of the infants, he clearly was not the legal guardian, and had no rights to defend that suit in their name. The decree in the suit, therefore, was not binding upon the infants. The Plaintiff in that suit attempted to execute his decree against the property of the infants. The Judge of the First Court says:—“*Sheo Nundun Persad*’s entire ancestral property, and what he had inherited after the death of *Hur Nundun* as his legal heir, were sold for satisfaction of several decrees.” He had, therefore, no property upon which the decree could be executed; and therefore the Plaintiff in that suit attempted to execute the judgment which he had obtained against the minors by seizing their property in execution of the decree. The object of the suit under appeal was to declare that the Plaintiff in the former suit was not entitled to execute the decree against the infants’ property and to restrain them from executing it against that property.

Then it was attempted to shew that, although the decree had been obtained against the infants without their having been represented by a guardian, still the suit was brought for a debt for which they were liable. Whether that could justify the execution of the decree it is not necessary now to inquire, because the Court below went into the question whether the bond was given for a debt for which the infants were liable, and held that it was not. After stating all the facts of the case, the Judge says, "It would appear that the debt was contracted by a person who was not manager of Plaintiffs' estate ; that it was not for any unavoidable or pressing necessity, or for any benefit of the estate of the Plaintiffs ; that the defendant did not inquire into these matters ; and that he obtained a decree in a case wherein the Plaintiffs were not properly represented. The decree cannot, therefore, be enforced against the person or property of the plaintiffs."

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The case was appealed to the High Court, and that Court came to the same conclusion with reference to the greater portion of the debt included in the bond, viz., that the money had not been borrowed on account of any necessity ; that it had not been borrowed for any benefit to the estate ; and that no inquiry had been made by the Plaintiff in the suit, at the time when he advanced the money, as to whether those advances were necessary for the protection of the estate or for the benefit of it ; and the High Court therefore upheld the decision of the First Court to a certain extent. But then they found that a portion of the debt for which the bond was given was a debt which was due from *Lalji*, the father of the present Plaintiffs ; and they held that although the present Plaintiffs might not be liable upon the decree, they were bound to pay the debt due from their father. The debt which was due from their father was a sum of about Rs.10,623. The High Court, however, did not award the whole of that sum against the Plaintiffs. After stating that the father was liable for the original debt to the extent of that amount, they say, "But the original debt due from the Plaintiffs' family has been apportioned amongst the several members, who have now separated. The Plaintiffs, whose share in the family property is one-sixth, are therefore liable to that extent for the amount which was due from

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their father and the other members of the family at the time of his death." It is objected that the decision of the High Court was wrong in that respect, and that if the Plaintiffs were liable for the debt of their father they were liable for the whole amount of the debt. But it appears to their Lordships that the Plaintiffs were not liable for the whole debt for which their father and the other joint members of the family were originally liable, the debt having been apportioned amongst the several members of the family, who had separated, and several bonds given for the several portions of the debt. It appears, therefore, to their Lordships that the High Court was right, and that the infants were not bound to pay the whole of the debt for which the father was at one period jointly liable with the other members of the family, and that they were liable only for the father's portion of the debt.

Under these circumstances their Lordships are of opinion that the High Court came to a correct decision ; and they will humbly advise Her Majesty that the decree of the High Court be affirmed. The Appellant must pay the costs of this appeal.

Solicitor for Appellant : *T. L. Wilson.*

Solicitors for Respondent : *Watkins & Lattey.*

MUSSUMAT BILASMONI DASI AND OTHERS DEFENDANTS;

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AND

1881

RAJAH SHEO PERSHAD SINGH . . . PLAINTIFF.

Nov. 30;

Dec. 1.

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ON APPEAL FROM THE HIGH COURT AT BENGAL.

Jan. 21.

Construction—Mokurruri Ijara Pottah.

A mokurruri ijara pottah does not necessarily import perpetuity. "Mokurruri" may do so but not necessarily.

Held, on a consideration of the object of the pottah and its language and provisions as well as surrounding circumstances, that the intention to grant a perpetual lease did not sufficiently appear.

APPEAL from a decree of the High Court (Aug. 30, 1879) whereby a decree of the Subordinate Judge of *Bhaugulpore* (June 23, 1877) was reversed and the Respondent was awarded possession of mouzah *Bhalwana* with mesne profits.

The facts of the case appear in the judgment of their Lordships.

Leith, Q.C., and *Doyne*, for the Appellants, contended that upon a due consideration of the terms of the pottah it was intended to confer and did confer a permanent and hereditary tenure. The pottah was granted eight months after the settlement and was in terms similar to those of the government pottah. As there was no question regarding the hereditary and permanent character of that settlement, it was contended that at that date and in that district words of inheritance were not regarded as necessary or usual in making permanent grants. In a case of *Laidley v. Hurdzal Augustie*, unreported, the High Court had construed a lease which contained no words of inheritance as being an hereditary lease. Supposing the terms of the pottah to be doubtful the reasonable presumption from the evidence as to the condition of the mouzah at its date and from the language and conduct of the parties afterwards was that they intended to give and take

* *Present* :—SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

J. C. a permanent tenure. Reg. XLIV. of 1793 was in force when
1881-2 the pottah was granted.

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Cowie, Q.C., and Woodroffe, for the Respondent, contended that the pottah in question did not create and was not intended to create a permanent hereditary tenure, that it enured only for the life of *Roghunath Singh* and that therefore at his death the Respondent was entitled to enter upon and resume direct possession of the mouzah. [SIR BARNES PEACOCK referred to Reg. VIII. of 1793, sec. 16, which declares that certain mokurraridars should be treated as life owners.] See *Joba Singh v. Meer Najeeb Oollah* (1). Reference was also made on the question of construction to *Bebee Sowlutoonissa v. Robert Savi* (2); *Sarobur Singh v. Rajah Mohendernarain Singh* (3); *Baboo Dhunput Singh v. Gooman Singh* (4), referring to *Doe v. Watson* in *Morton's Reports* (5); *Lekraj Roy v. Kunhya Singh* (6).

Leith, Q.C., replied.

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The judgment of their Lordships was delivered by

SIR RICHARD COUCH :—

This is an appeal from a decree of the High Court of *Calcutta* whereby the decree of the Subordinate Judge of *Bhaugulpore* was reversed, and the Respondent the Plaintiff in the suit was awarded possession of mouzah *Bhalwana* with mesne profits thereof from the 22nd of August, 1876, together with interest and costs.

Mouzah *Bhalwana* is situate within and forms part of pergunnah *Gedhour*, the Respondent's ancestral zemindary. On the 21st of February, 1798, a pottah was granted by the government to Rajah *Gopal Singh* and Rajah *Bharat Singh*, therein described as zemindars of pergunnah *Gedhour*, in which it is stated that the annual consolidated jumma of the said pergunnah, inclusive of the ganjats, markets, bazars, all sayers and motahariffas, and also of rent-free lands held under sunnuds and without sunnuds, had together with the fee of kanoongoes, been fixed and assessed permanently at sicca

(1) 4 Sel. Rep. 271.

(2) S. D. A. (1859) p. 1575.

(3) S. D. A. (1860) p. 577.

(4) 11 Moore's Ind. Ap. 433, 463.

(5) 1 Morton, p. 255.

(6) Law Rep. 4 Ind. Ap. 223, 225.

Rs. 1501 from 1205 Fusli. In the register of pergunnah *Gedhour* for the year 1205 Fusli, the gross proceeds of mouzah *Bhalwana* are entered as Rs.6. 3a. 10p., and the sudder jumma as Rs.4. 1a. 5p., and it is not disputed that at that time it was almost wholly in jungle and unprofitable. It appears from the thakbust map which was prepared in 1846 that the entire area of the mouzah is 7500 bighas, of which 3000 were then under cultivation.

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On the 28th Kartick 1206 Fusli, corresponding with the 21st of November, 1798, Rajah *Gopal Singh* granted to *Roghunath Singh*, the father of the Appellant, *Ram Lall Singh*, a pottah in the terms following :—

“ I have acquainted myself with the contents of this.

“ The stipulation of pottah granted on receipt of kubulyut to *Roghunath Singh*, mokurruri ijardar of mouzah *Bhalwana*, appertaining to pergunnah *Gedhour*, in the sircar and province of *Behar*, on behalf of Rajah *Gopal Singh*, is to the effect and purport following :—

“ Whereas the mokurruri ijara potta of the said mouzah is granted from 1206 F.S., at a consolidated jumma specified below, inclusive of *malikana*, subject to no objection or excuses on the score of calamities of weather, together with fisheries and fruit trees ; with the exception of *abkari* and toddy *gunjes*, bazars, *kauts*, all sayer, *mothurfa* (taxes levied on professions), lakheraj lands, covered by sunnuds and not covered by sunnuds, *rosum* of *rosumdars*, daily allowances of *rozanadars*, and *chandas* of *chandadars* ; the above-named person should, with ease of mind, make cultivation and improvement, pay the above amount year after year, crop season after crop season, instalment after instalment, as per kistbundi, in full, into the treasury of this Sircar (Rajah) raise no objection whatever on the score of drought, inundation, hail storms, deaths and desertions, but himself bear the losses arising therefrom. In addition to the above jumma, whatever profits may be derived from salutary improvement in cultivation by him shall belong to the mokurruridar, the Sircar having nothing to do with the same. In case of non-payment of instalments agreeably to the kistbundi, month after month, the mutsuddis of the Sircar shall have authority to realize the arrears by sale of the goods and chattels of the above-named, to send sazawal or attaching officer to the said

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—

village, and make and receive the collections. The expenses of entertaining sazawal, tehsildar, and others shall be borne by the above-named. He should keep the tenants of the said village satisfied and contented by his good treatment, and make collections from the tenants according to order of government, agreeably to pottas of nukdi and *bhowli* lands to be granted to them, and never demand any sum in excess. He should not in any way commit oppression upon tenants, so that they may be able to stand to their engagements, and he should not oust them until the determination of their leases. He should grant receipts to the tenants upon payment of rent, instalment after instalment. He should not give a single span of land in the said village without asking permission and without consent of the huzoor, nor resume any previously granted without the orders of the huzoor. Should the said lakheraj lands be hereafter resumed under orders of the huzoor, and the huzoor be pleased to make a settlement of the rent thereof with the ticca mokurruridars, then the above-named shall pay the rent thereof according to the settlement to be made by the huzoor. He should not suffer a single span of the land on the limits and boundaries to pass and to be included in the boundary of others. Should it so happen he should of his own accord inform the Sircar of it, have the matter settled with the aid of the Sircar, and maintain and preserve the boundaries and limits of the said mouzah. He should not allow thieves and padders to settle within the estate leased to him. God forbid ! should anybody's property be robbed and plundered he should trace out the thieves and robbers with the property, and produce them before the thanadar or the district authority. Should the thanadar apprehend the robbers and apply to him for aid, he shall forthwith afford assistance to him. He should bring without fail to the notice of the huzoor whatever property may be found belonging to dead persons, or that is deserted or lying buried underground, without heirs to claim it. He should act in strict conformity with the orders already passed or to be hereafter passed by the huzoor for regulating settlement of rent with tenants and malguzars of all classes, and should never raise any excuse or objection whatsoever. He should not demur or put forward any excuse in this, and should act up to the above.

"Rent for four years to be paid without any objection or excuse.

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"Rs.24.

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	Rs.
" For 1206 Fusli	6
" 1207 "	6
" 1208 "	6
" 1209 "	6

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" Uniform rent from 1210 Fusli to be paid year after year, crop season after crop season, without any objection or excuse, sicca Rs.25 current in the province.

" One half of which is Rs.12, 8a.

" Dated 28th Kartick 1206 Fusli."

Roghunath Singh executed a corresponding kubalyut bearing the same date.

The other Appellants are the representatives of the Defendants in the suit who derived their title from *Roghunath Singh* and denied the Plaintiff's title; and no question is raised in this appeal as to their derivative title, nor as to *Rajah Bharat Singh* not having joined in the pottah.

On the death of *Rajah Gopal Singh* in or about October, 1812, his son *Rajah Jeswant Singh* declined to receive the rent of mouzah *Bhalwana*, alleging that his father had taken possession thereof at the end of the year 1219 Fusli under Regulation VII. of 1799, and that a fresh pottah had been granted to *Roghunath Singh* for eleven years from 1220 Fusli, at the yearly rent of Rs.51. Thereupon summary proceedings were taken by *Roghunath Singh* to compel the *Rajah* to receive his rent at the old rate, the result of which was that *Jeswant Singh* was referred to a regular suit if he desired to substantiate his allegation.

On the 13th of February, 1821, *Rajah Nawab Singh*, the younger brother and successor of *Jeswant Singh*, who had died in the previous year, brought a suit in the Court of the Registrar of *Monghyr* against *Roghunath Singh* and his surety to recover the rents then due for mouzah *Bhalwana* under the alleged lease for eleven years. In his answer *Roghunath Singh* asserted that he held under the pottah of 1798, and denied the eleven years' lease. And the district Judge, by a decree made on the 9th of January, 1826,

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on appeal from the decision of the Registrar, directed that *Roghunath Singh* should remain in possession in accordance with the pottah of 1798, and pay the rent therein reserved.

In 1869, the Respondent succeeded to the zemindary, and on the 24th of July, 1875, *Roghunath Singh* died. This suit was brought on the 22nd of August, 1876, and the only question in the appeal before their Lordships is whether the pottah is a lease for life or in perpetuity.

Their Lordships were referred by the learned counsel for the Respondent to several cases in the late Sudder Court in which it was ruled that a lease at a fixed rent without more did not import perpetuity, and that to create a perpetual lease the addition of the words "from generation to generation," or other words importing perpetuity, were necessary.

On the other hand, it was held by the High Court at *Calcutta*, in a case of ghatwallee tenure, where the words "mokurruri istemrari" were used, that the holding was perpetual(1). But this Committee, on an appeal from that decision, held that these words might mean either permanent during the life of the person to whom the grant was made, or permanent as regards hereditary descent(2).

In the present case the word "istemrari" is not used. The instrument is called "the mokurruri ijara pottah," and their Lordships, in the case of the *Bengal Government v. Nawab Jafir Hossein Khan* (3), stated their opinion to be that though "mokurruri" might import perpetuity, that was not the necessary meaning of the word.

The question then is, whether the intention of the parties is shewn by the other terms of the instrument, the circumstances under which it was made, or the subsequent conduct of the parties, with sufficient certainty to enable the Courts in the absence of words importing perpetuity to pronounce that the grant was perpetual? The Subordinate Judge held that the pottah was intended to be hereditary, because it appeared that the mouzah was covered with jungle when the mokurruri was granted, and that it had since been brought under cultivation through the exertions and

(1) 3 Suth. W. R. 84 ; 5 Suth. W. R. 101. (2) 13 Beng. Law Rep. 133.

(3) 5 Moore's Ind. Ap. Ca. 498.

labour of the original mokurruridar and his representatives, and therefore it might, "consistently with the principles of equity, be presumed that the lessor and lessee must have thought at the time that the lease in question should be granted in perpetuity, because it is void of reason to suppose that the lessee should have taken the lease for his life, and brought it under cultivation at heavy expense and through great exertion." As to the subsequent conduct of the parties, he said that if the representatives of *Gopal Singh* "had considered the lease as one for life, they would have never adopted such steps as were incompatible with their position and dignity to cancel such life interest as was thought by themselves to last only for a few days, and *Roghunath Singh* himself would not have described the mokurruri as a permanent one." Their Lordships are unable to see the force of this observation; but it appears from it that the Subordinate Judge did not fail to consider everything that he thought might shew the intention of the parties. It is therefore to be remarked that he did not refer to any of the provisions in the pottah or of the words used to express them. Apparently he thought they did not shew any intention that the pottah was to be perpetual.

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—

The High Court agreed with the Subordinate Judge that the lease was granted with a view to the improvement of the mouzah, but thought that this did not shew it was intended to be hereditary, and referred to some of the provisions which they said seemed necessarily to imply that a substantial interest in the property remained in the Rajah, and were quite inconsistent with his having permanently parted with that interest. Their Lordships do not concur in all the views taken by the High Court of these provisions, but on the other hand they do not find in them sufficient to shew an intention that the lease should be permanent. They are consistent with either intention.

A case in the High Court at *Calcutta*, printed in the Record was referred to by the learned counsel for the Appellants, in which Mr. Justice *Mitter* said,—“We do not find it usual that tenants taking upon themselves the trouble and outlay for clearing and reclaiming jungle lands are contented with anything short of hereditary interest in them.” But the judgments of the learned Judge and the lower Court are expressly stated to be

J. C. founded upon the fair construction of the terms of the grants, and
 1882 the surrounding circumstances attendant on the execution of
 — them, as well as the conduct of the Plaintiff in connection with
 MUSSUMAT that and similar other tenures in his zemindary. The learned
 BILASMONI Judge only refers to what is usual as a circumstance which supports
 DASI his view.
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Their Lordships would repeat what was said by this Committee in *Baboo Dhunput Singh v. Gooman Singh* (1), where it was proved that the hereditary character of the pottah had been recognised by the successive zemindars. "If, on the one hand, it is improbable that the grantee should undertake such an obligation without some fixity of tenure and some assured and permanent interest in the lands, it is, on the other hand, equally improbable that the grantor should part for ever with all his interest in the improveable value of the lands."

As the Appellant is unable to point to any words in the pottah importing perpetuity, it appears to their Lordships, upon a consideration of the object of the pottah and its language and provisions, as well as the surrounding circumstances, that the intention to grant a perpetual lease does not sufficiently appear, and they are therefore unable to say that the decision of the High Court is not the right one. They will, therefore, humbly advise Her Majesty to dismiss the appeal, and the costs thereof will be paid by the Appellants.

Solicitor for Appellants : *T. L. Wilson.*

Solicitors for Respondents : *Barrow & Rogers.*

(1) 11 Moore's Ind. Ap. Ca. 465.

THAKURAIN RAMANUND KOER . . . PLAINTIFF ; J. C.*
 AND
 THAKURAIN RAGHUNATH KOER AND } DEFENDANTS. 1881
 ANOTHER . . . , . . . } Nov. 23, 25,
 26, 29,
 ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER, 1882
 OUDH, Jan. 21.

ANANT BAHADUR SINGH . . . PLAINTIFF ;
 AND
 THAKURAIN RAGHUNATH KOER AND } DEFENDANTS.
 OTHERS . . . , . . . }
 ON APPEAL FROM THE COURT OF THE COMMISSIONER OF
 FYZABAD DIVISION.

Oudh Estates Act, 1869, s. 9—Trustee—Declaratory Suit—Specific Relief Act.

In a suit by a widow of a deceased talookdar against another widow and her transferee of the talook for a declaration of the Plaintiff's right to succeed to the estate in suit after the death of the first Defendant, the latter pleaded that by virtue of a summary settlement made with her in 1858, a sunnud granted in 1861, and the entry of her name on the first and third lists prepared under sect. 8 of Act I. of 1869, she had under sect. 9 an absolute estate with full power of alienation :—

Held, that the Defendant had by her acts and declarations constituted herself a trustee for the purpose of carrying into effect her husband's will, and that thereunder the Plaintiff was entitled to the declaration sought.

In another suit by a Plaintiff entitled under the said will in remainder after the determination of the life estates of the widows, for a declaration of the invalidity of the transfer of the estate, *held* that the suit was maintainable under the *Specific Relief Act*, and that although declaratory relief might have been reasonably refused to him as a remote remainderman in a second declaratory suit, yet the suit having been wrongly decided against him on the merits, he was in appeal entitled to the decree sought.

THESE appeals in two different cases from two different Courts relate to the same will and estate and were argued successively, judgment in both appeals being reserved.

Appeal in the first case from a decree (July 17, 1878) of the Judicial Commissioner affirming a decree of the Commissioner

* *Present*:—SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

J. C. of *Fyzabad* (Nov. 17, 1877), which reversed a decree (July 5, 1881-2 1877) in favour of the Appellant by the Deputy Commissioner of *Fyzabad*.

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Appeal in the second case from a decree of the Commissioner of *Fyzabad* (Nov. 17, 1877) affirming save with regard to costs a decree of the Deputy Commissioner (July 2, 1877).

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RAGHUNATH
KOER.

The facts are stated in the judgment of their Lordships.

Leith, Q.C., and *J. H. Arathoon*, for the Appellant, contended that the Deputy Commissioner was right in holding that *Raghunath's* letter of the 6th of January, 1860, in which she wrote to the Government to the effect that her two rival widows would succeed, and after them the nearest male heirs of her husband *Nihal Singh*, shewed that she had *Nihal's* will in her mind, and still considered the widows the proper persons to succeed her. He was also right in deciding that in the document D *Raghunath* admitted that she held the estate of *Sihipur* in trust. The Appellant was therefore the *cestui que trust* of the registered talookdar and there was abundant authority for the proposition that Act I. of 1869 had not swept away her rights or relieved the talookdar from the duty of giving effect to any trusts which he might have created or recognised. There were admissions of a trust on the part of the Respondent both before and after the summary settlement. Reference was made to *Thukrain Sookraj Kowar v. Government of India* (1); *Widow of Shunker Sahai v. Rajah Kashi Pershad* (2); *Hardeo Bux v. Thakoor Jowahir Singh* (3); *Brij Indar Bahadur Singh v. Ranee Janki Koer* (4); *Thakoor Shere Bahadoor Singh v. Thakurain Dariao Kuar* (5); *Seth Jaidial v. Seth Sita Ram* (6); *Hurpurshad v. Sheo Dyal* (7).

Cowie, Q.C., and *Woodroffe*, for the Respondents, contended that under *Nihal's* will none of the widows had widow's estates but only life estates with remainders over. There was nothing proved in the nature of a trust in favour of the Appellant, there

(1) 14 Moore, Ind. Ap. Ca. 127.

(2) Law Rep. 4 Ind. Ap. 198 203 ;
Supp, Vol. 220.

(3) Law Rep. 4 Ind. Ap. 193 ; and
again 6 Ind. Ap. 161.

(4) Law Rep. 5 Ind. Ap. 1.

(5) Ind. L. R. 3 Calc. S 645.

(6) Law Rep. 8 Ind. Ap 215.

(7) Law Rep. 3 Ind. Ap 259.

was only a statement of the terms under which the Respondent was willing to carry out the will. Under the agreement *Raghunath* asserted entire command and proprietorship over the estate. The effect of the confiscation was to destroy whatever rights the Appellant may have had in the estate under the will. They were not re-granted to her. Under Act I. of 1869 the Respondent acquired an absolute right in *Sihipur* as the talookdar thereof, without reference to her title from her husband. There was no proof of any declaration of trust. The expressions relied on upon the other side are rather expressions of an intention as to what should become of her property after her death, than as a declaration of trust or intimation that she was no more than a life owner. The cases cited are distinguishable, for instance in one there had been no confiscation, the cases of *Shunker Sahai's* widow and *Hurdeo Bux* were those of excepted estates. The case in 14th *Moore* was one of the grossest fraud.

J. C.

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RAGHUNATH
KOER.

Further, the Appellant was not entitled to a declaratory decree. See *Thakoor Deen Tewarry v. Nawab Syed Ali Hossein Khan* (1). There is a distinction between the right of a mere reversioner to such decree and the right of one who stands in the position of guardian of the inheritance. See *Shivagunga Case* (2); *Garlick v. Lawson* (3); *Lady Langdale v. Briggs* (4); *Pranputtee Koonwar v. Lalla Futtah Bahadoor* (5); *Rani Annund Koer v. The Court of Wards* (6); Act I. of 1877, sec. 42 clause (d.) These authorities apply still more strongly to the case of the Appellant in the second case.

Leith, Q.C., replied.

The judgments of their Lordships were delivered by

SIR ROBERT P. COLLIER :—

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Jan. 21.

THAKURAIN RAMANUND KOER v. THAKURAIN RAGHUNATH
KOER AND ANOTHER.

This suit is brought by *Ramanund Koer*, one of the widows of *Nihal Singh*, talookdar of *Sihipur*, against *Raghunath Koer*,

(1) 13 Beng. L. R. 427

(N.S.) (Ch.) 42.

(2) Law Rep. 2 Ind. Ap. 169.

(5) 2 Hay's Reps. 608; S C. Seves-

(3) 10 Hare, App. xiv.

ter's Rep. note 638.

(4) 8 De G. M. & G. 391; 26 L. J.

(6) Law Rep. 8 Ind. Ap. 14, 22.

J. C. another of his widows, and *Bisheshar Buksh Sing*, to whom the
1882 latter widow had made a gift of the talook.

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The suit is described as a suit for a declaratory decree under the 6th chapter of the *Specific Relief Act*, and the plaint prays for a declaration "that the Plaintiff is the reversioner, and is entitled to succeed to the estate of *Sihipur*, after the death of the first Defendant, who holds only a life interest and is a trustee, anything contained in Act I. of 1869 notwithstanding."

There follows a short statement of facts, viz., that *Nihal Sing* was talookdar and owner of *Sihipur*, that he died in the year 1832, leaving him surviving five widows, of whom the first Defendant is the third, and the Plaintiff the fourth. That the first widow succeeded her husband in the possession of the talook, and that upon her death, the second widow having predeceased her, the first Defendant succeeded in pursuance of a will of *Nihal Sing* and that the first Defendant has acknowledged that she holds a life estate only under the will. That the said Defendant made a gift of the estate to the second Defendant on the 27th of February, 1877. The plaint concludes thus:—

"The Plaintiff submits that, as the first Defendant is only a holder of a life interest and is a trustee, the gift is invalid. The Plaintiff therefore prays that she is entitled as a reversioner aforesaid."

It was not contested that by virtue of Act I. of 1877, sect. 42, such a suit is maintainable. The case of the Defendants was, in substance, that *Raghunath Koer* had, by virtue of a summary settlement made with her on the 2nd of December, 1858, and of a sunnud on the 15th of March, 1861, followed by the entry of her name on the first and third lists prepared by the Chief Commissioner of *Oudh*, under sect. 8 of Act I. of 1869, as published in the *Gazette of India*, under sect. 9 of that Act, an absolute estate, which she had power to alienate to whom she chose.

The case of the Plaintiff was that, granting the legal title thus conferred upon the first Defendant, she has so conducted herself that she must be deemed in equity to be bound to hold the estate in trust for the purpose of carrying into effect the provisions of her husband's will.

Whether or not she has so conducted herself is the question in the cause.

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The Deputy Commissioner gave judgment for the Plaintiff, the Commissioner and the Additional Judicial Commissioner for the Defendant. Against the judgment of the latter this appeal is preferred.

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The will of *Nihal Singh* is in these terms :—

“ I, *Nihal Singh*, talukdar of *Sihipur*, do hereby declare in writing that I have married five wives, and therefore I execute this deed, and deliver it into the custody of *Baldi Ram Pandit*. After my death my first wife should become the proprietor of the taluka, and all the goods and chattels that may be in my house, and she shall support the other four wives by supplying them with food and raiment, and they shall not claim a share in the estate. After the death of my first wife, my second wife shall become the proprietor of the estate ; on the death of the second wife, the third wife shall become the proprietor, on her death my fourth wife, and on her death the fifth wife shall become proprietor. After the death of all the five wives, *Sheoambar Singh* (may he live long) shall become proprietor of my estate, goods, and chattels.

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“ I have reduced the above into writing in order to maintain the integrity of the *Sihipur* estate, and to perpetuate its name and memory. Every one in my house is interdicted by oath of my person to do any act contrary to the terms hereof. I pray God that any one contravening it may be visited with calamity, similar to what befell the people of *Chittaur*. The Hindus are bound by oath of the *Ganges*, and the Mahomedans by the *Koran*, to act in consonance with the terms hereof, I have no issue, and therefore I have executed this deed. But if I get a child it shall succeed to my estate, and manage all the affairs.

“ Dated this 5th day of Asarh Badi, 1238 Fusli (30th June, 1831).

“(Signed) *Sheodial Mahajan*,
“ Resident of *Sahibganj*.

“ Witnessed by—

“ *Gurdial Kaeth*, of *Hirdepur*, and

“ *Ram Ghulam Lal*, of *Katra*.”

J. C. With respect to the devolution of the estate after the death of
 1882 the testator, their Lordships adopt the view expressed by the
 ———
 THAKURAIN Commissioner in his judgment of the 17th of November, 1877.
 RAMANUND “Whoever may have been considered ‘malik’ or real owner of
 KOER the estate, it seems certain that none of the widows engaged for
 v. it as revenue payers with Government, subsequent to the death of
 THAKURAIN it as revenue payers with Government, subsequent to the death of
 RAGHUNATH *Nihal Singh*. Till after the death of *Harpal Singh*, shortly before
 KOER. annexation, the present holder being the senior surviving widow,
 ——— perhaps took an engagement, and was found in possession at
 ANANT annexation.”
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 v.
 THAKURAIN Had the talookdar left no will, each of the widows would by the
 RAGHUNATH ordinary Hindu law have been entitled to an equal share of the
 KOER. estate; and after the death of *Harpal* (who would seem to have
 ——— taken unauthorized possession of it) the three surviving widows
 viz., the Defendant, the Plaintiff, and *Sheonath* the fifth widow
 (who has not joined in this suit), would have been entitled to
 share it. What was the effect of the sunnud granted to the De-
 fendant by the Native Government, if a sunnud was granted to
 her, we do not know, but it may not be unfairly presumed to have
 been in accordance with her husband’s will.

The first material piece of evidence in the case is a letter (marked C) from *Raghunath* to *Ramanand*, dated the 9th of April 1856, about two months after the annexation of *Oudh*, in these terms:—

“Accept my good wishes and prayers for you. May God bless us both. Now the partition deed has been written, but considering your expenses to be heavy, I will pay you Rs.500 per annum, separate from *Sheonath Koer*. But mind, you have to maintain our position; and after my death all the burden will fall upon you.”

In the absence of any information relating to the “partition” referred to, it is difficult fully to understand the meaning of this letter. It has been argued, with some force, that the payment for expenses, together with the intimation that the burden of the inheritance will fall on *Ramanand* after the death of the writer, is a recognition that she holds under the terms of her husband’s will.

The next document relied on by the Appellants is a deed of compromise (as it is termed) dated the 14th of November, 1858, by which it would appear that certain disputes between the widows were for a time settled. This transaction took place some eight months after the confiscation of *Oudh* (15th of March, 1858), and before anything had been done to reinstate the land-owners. The instrument is in two parts, one executed by *Raghunath*, the other by the other widows.

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The latter document, marked D, is as follows :—

"Both of us, *Ramanand Koer* and *Sheonath Koer*, co-widows of *Thakur Nihal Singh*, talukdar of *Sihipur*, &c., do hereby agree with our free will and consent and bind ourselves in writing to *Thakurain Raghunath Koer*, that so long as she lives she may manage the affairs of the *ilaka*, &c., and out of the allowance of Rs. 400 per annum fixed by her to enable us to pay for the expenses of our winter clothing, raiment, and charity, and other necessities of life, we will defray our expenses and will not indulge in extravagance. We will all three take our food, nice, or coarse, whatever is cooked, together, and live in harmony with each other. We will not interfere with the management of the estate. We will try to maintain and guard what was earned by *Thakur Nehal Singh*, and will not waste it by extravagance. If perchance any expenses are required for the protection of life, property, or *zemindari*, they shall not be incurred without the sanction of *Ragunath Koer*.

"As long as the said *Raghunath Koer* lives and pays both of us according to the agreement herein recorded, we will not complain to the brotherhood or to the authorities, and if we do so we shall render ourselves liable to blame before God, brotherhood, and the authorities. If God preserves the *ilaka* in its present condition we will continue to receive the allowance mentioned above, but if perchance the estate is increased or decreased we will, of course, receive the allowance at an increased or decreased rate, as the case may be. Our parents, brothers, and relations will be allowed to visit us according to the universal custom of the country."

Though no express mention is therein made of the will, their Lordships regard this document, which recognises the right of

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 —
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 —

Raghunath to a life estate in the entire property to which she was only entitled under the will, and her duty to pay an allowance to the other widows which was only prescribed by the will, as an affirmance by both parties of its binding effect upon them. Shortly after this, viz., on the 2nd of December, 1858, a summary settlement of a number of villages was made with the Defendant for three years.

The principal difficulty in this case arises from the conduct of the Plaintiff.

Subsequent disputes arose, in the course of which the Plaintiff repudiated this agreement or compromise, and indeed denied its existence, while on the other hand the Defendant in the most explicit terms set up the will, and claimed her rights under it.

On the 30th of March, 1859, the Plaintiff presented a petition to the revenue authorities, praying that she might be recorded as owner of one-third of the estate, a claim in direct opposition to the will. On the question being referred to the *tesildar*, the Defendant again set up the will, defended her exclusive possession under it, succeeded in her defence, and retained possession of the whole estate.

The litigation seems to have been ended by the following *sulehnamah* or deed of compromise on the 9th of December, 1859 :—

“We, *Musstt. Kawal Jhari Koer*, Plaintiff, and *Raghunath Koer*, Defendant, widows of *Nihal Singh*, deceased, *talookdar* of *Sihipur*, *parganna Sultanpur*, declare herein that :—

“Where there has been going on a dispute between both of us about the share of inheritance, and the case was pending in the Court: The Deputy Commissioner of *Fyzabad* personally came to *Khapradih* and disposed of the dispute with our mutual consent in the following manner: that residing in *Gaura* or in *Sihipur Khas*, *Kawal Jhari*, Plaintiff, shall get from *Raghunath Koer*, Defendant, Rs. 450 in cash, per annum, for her expenses. Consequently we, the Plaintiff and the Defendant, having compromised, have recorded these few words as a deed of compromise (*sulehnamah*), that it may serve as a document for the future. And if ever we bring a claim in this matter we shall render ourselves amenable to Government.

"Dated this 9th day of December, 1859, corresponding with the 14th of Aghan Sudi."

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In January, 1861, a letter, probably a circular letter, was sent to the Defendant, no copy of which is, unfortunately, to be found in the record, and whose purport can only be collected from her answer, which is in these terms (it is called Document E.) :—

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"Sir,—I have the honour to acknowledge the receipt of your parwana (letter), dated the 7th of December, 1860, inquiring as to whom I wish to bequeath my estate after my death, and what relationship he bears to me.

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KOER.

"Sir, so long as I live I shall continue to be the proprietor and mistress of my estate. After my death my rival widows, *Mt. Sheo Nath Koer* and *Ramanand Koer* shall succeed to my heritage and the estate. But I must note that none of my two rival widows shall have power to alienate the estate by gift, transfer, or grant to any of their relatives, or to any stranger after my death, except *Ram Sarup Singh* and *Balbhadar Singh*, talookdars of *Khapradih*. After my death, and after the death of the two rival widows, *Ram Sarup Singh* and *Balbhadar Singh*, talookdars of *Khapradih*, shall inherit the estate and all our legacy. The said talookdars are my great grandsons as described below.

"My husband, *Thakur Nehal Singh*, had an elder brother, *Ganga Parshad Singh*. My husband was killed and left no issue. *Ganga Pershad Singh* had three sons, *Sheo Sewak Singh*, *Hubdar Singh*, and *Harpal Singh*. *Harpal Singh* also was killed and left no issue. *Hubdar Singh* had a son, by name *Bhairon Singh*, who died during the lifetime of his father; soon after *Hubdar Singh* was also killed. *Sheo Sewak Singh* had a son, by name *Sheoambar Singh*. The latter has left two sons, *Ram Sarup Singh* and *Balbhadar Singh*, talookdars of *Khapradih*, who shall succeed us and inherit all property.

"Petition of *Raghunath Koer*, talookdar of *Sihipur*, &c., pargana *Sultanpur*.

"Dated this 6th day of January, 1861."

It should be mentioned that another translation of this letter represents the inquiry to have been "whom she wished to appoint as her successor."

J. C. On the 15th of March following the Defendant received a
 1882 sunnud, whereby an estate of inheritance according to the law of
 ——— primogeniture, together with full power of alienation, was granted
 THAKURAIN to her.
 RAMANUND
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v.
 THAKURAIN The letter of the 6th of January is treated by the two Appellate
 RAGHUNATH Courts as simply a will, revocable by the testatrix and revoked by
 KOER. her when she made the gift to her nephew, the second Defendant,
 ——— who, it may be stated, is not a member of her husband's family.
 ANANT If it had stood alone it might have been so treated, according to
 BAHADUR the view of this committee in the case of *Hurpurshad v. Sheo*
 SINGH *Dyal* (1), with reference to a somewhat similar document, but
 v.
 THAKURAIN which, having been acted upon, was there treated as amounting
 RAGHUNATH to a conveyance *inter vivos*. But, looking at the document in
 KOER. connection with the will of *Nihal Singh*, the other documents, and
 ——— the conduct of the Defendant in the suit before the revenue
 authorities, their Lordships regard it rather as a declaration that,
 on her death, the estate would devolve according to the directions
 of the will.

The doctrine that, notwithstanding the confiscation of the land in *Oudh* by the proclamation of Lord *Canning*, its restoration by his circular letter of the 10th of October, 1859, affirming the absolute title of the grantees of summary settlements, and the granting a sunnud with the full power of alienation, confirmed by the *Oudh Estates Act* of 1869, the legal owner may, either by express agreement or by his conduct, constitute himself in equity a trustee for others as to the whole or part of the beneficial interest, has been affirmed by many decisions of this Board.

This doctrine was first laid down in these terms in the judgment delivered by Lord Justice *James* in the case of *Thukrain Sookraj Kowar v. The Government and Others* (2) :—

“ It (the Government letter of the 10th of October, 1859) gave the registered talookdar the absolutely legal title as against the State, and against adverse claimants to the talookdari ; but it did not relieve the talookdar from any equitable rights to which, with a view to the completion of the settlement, he might have subjected himself by his own valid agreement. In this case the

(1) Law Rep. 3 Ind. Ap. 259.

(2) 14 Moore's Ind. Ap. Ca. 127.

Appellant was the acknowledged *cestui que trust* of the registered talookdar, who bound himself expressly in writing that he would respect her rights if she would permit him to be alone so registered."

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—

In the case of the widow of *Shunker Sahai v. Rajah Kashi Pershad* (1), it was held that, with respect to a one-third share of seven villages in the talook, the Rajah had, though no formal deed or writing was produced, by his admissions at the time of the summary settlement, constituted himself a trustee for the Plaintiff so as to be bound to account to her for a one-third share of the rents and profits.

The doctrine was further illustrated by the case of *Thakoor Hardeo Bux v. Thakoor Jawahir Singh* (2). The evidence being unsatisfactory, the case was remitted for retrial on the following issue, viz., "whether the Respondent has in any or what manner agreed or become bound to hold the villages comprised in the summary settlement and sunnud, or any or what part thereof, in trust for the Appellant."

On the case again coming before this Board, their Lordships observe,—“The actual relation of the Appellant, the Respondent, and *Parbut Sing* (who was no party to the appeal) remained that of a joint and undivided Hindu family from the date of Lord *Canning's* proclamation up to the quarrel and removal of the Respondent to *Kaswara* in 1865. The Commissioner also found, and correctly in their Lordships' opinion, that the evidence proved that during that period there had been a joint interest in and common management of the property. Such an interest could not have existed unless the Defendant had consented that the villages should be held as the joint property of the family. Their Lordships are of opinion that the facts so found, coupled with the statement of the Defendant in his application for a summary settlement, to the effect that *Hardeo Bux* was his partner, and with his deposition on the 8th of July, 1859, in which he stated that the custom prevailing in his family was that if his cousins, meaning the Plaintiff and *Parbut Sing*, who were his partners, should claim, they could get their shares divided afford sufficient grounds to justify their Lordships

(1) Law Rep. 4 Ind. Ap. 198 ; Suppl. Vol. 220.

(2) Law Rep. 4 Ind. Ap. 178.

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presuming that, up to the time of the quarrel in 1865, it was the intention of the Defendant that the villages included in the summary settlement and sunnud should be held by him in trust for the joint family and as a joint family estate, subject to the law of the Mitakshara" (1).

The principles of equity laid down in these cases (to which others might be added) appear to their Lordships to apply to the facts of the present case.

The Defendant *Raghunath* all along, certainly from April, 1856, to the time when she obtained the sunnud, held herself out as claiming the estate under the terms of her husband's will.

At the time of the summary settlement with her, on the 2nd of December, 1858, the agreement or compromise of the 14th of November previous, which their Lordships interpret as a recognition by all the three widows of that will, seems to have been in force. Although the junior widows soon after repudiated that compromise, and the Plaintiff claimed in a suit one third of the property, the Defendant succeeded in defeating her by setting up the will, and the suit ended in a second compromise of the 9th of December, 1859, which, though not clearly expressed, their Lordships regard as in effect recognising the position of the Defendant which she claimed. This compromise, as far as appears, remained in effect until January, 1861, when the Defendant executed document E, which has been before referred to, and which, coupled with the surrounding and preceding circumstances, their Lordships regard as a declaration by *Raghunath* that she held the estate in trust—a trust which would bind her heirs—to carry into effect the provisions of her husband's will. It is said that nothing was done by *Ramanund* in consequence of *Raghunath's* affirmance of the will, and that she was in no way damnified thereby. But their Lordships think it very difficult to maintain that position. It is true that *Ramanund's* former claims are quite inconsistent with her present claim. But then she has been defeated, and *Raghunath* has succeeded. Without the will the two would have been ordinary Hindu widows, and *Raghunath* would not have been in a position to claim the sole benefit of the two settlements and of the sunnud which were granted to her. Document D is dated eighteen days before the summary settlements. Document E is

(1) Law Rep. 6 Ind. Ap. 163.

dated about ten weeks before the sunnud. At two critical points of time we find *Raghunath* the author of formal and important documents, which, though they do not expressly mention the will, are not explicable except on the supposition that she was abiding by the will, which, on other occasions, she expressly set up and successfully used as a defence to her possession. They are therefore of opinion that the Plaintiff is entitled to the relief she prays for, viz., that it may be declared that she is entitled to succeed to the estate after the death of the first Defendant. It follows that the deed of gift to the second Defendant could confer no more than the life interest of the first Defendant. There is no prayer to set that deed aside, and if there had been it could not have been effectual, inasmuch as the deed is not wholly void but operative to convey a life estate.

J.C.

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Their Lordships will humbly advise Her Majesty that the Judgment appealed against be reversed, that a declaration to the effect above mentioned be made, and the costs of both parties be paid out of the estate.

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AND OTHERS.

This suit was brought by *Ram Sarup Sing*, who was a son of *Sheoambar Sing*, to whom the estate was given in remainder after the life estates of the widows, by the will of *Nihal Singh*, which has been before set out. *Ram Sarup* having died, leaving the Plaintiff, his son, and *Ram Sarup's* brother, *Balbhadr*, having also died, without issue, the present Plaintiff succeeds to all the rights of *Sheoambar*.

He brings his suit against the Defendants in the former suit, with whom he has joined the two junior widows, for a declaratory decree under the *Specific Relief Act*, and prays to have it declared "that the deed of gift, dated the 27th day of February, 1877, is invalid against the Plaintiff, who is a reversioner, because the donor, the first Defendant, held only a life interest, and is a trustee, anything contained in Act I. of 1869 notwithstanding."

In their Lordships' opinion the Plaintiff, having, in terms of the English law, a vested remainder immediately after the life estates, is entitled, under the *Specific Relief Act*, to maintain this suit,

J. C. The question is whether the first Defendant is to be declared,
1882 *quoad* the Plaintiff, to hold the estate in trust for carrying into
— effect the provisions of her husband's will.

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The evidence in this case differs in some respects from that in the former case. The Exhibits C and D (of the dates 9th of April, 1856, and 14th of November, 1858, respectively) are not in evidence.

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The proceedings in the suit which has been referred to, of *Ramanath* against *Raghunath*, are in evidence.

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KOER.

Exhibit E (the letter of the 6th of January, 1861) is in evidence.

— In addition to these, two documents of some importance were tendered, one being a letter of Defendant to the present Plaintiff, of the 18th of January, 1870, marked "Bé;" another letter of the same date, marked "Alif," written (as alleged) by her agent, and referred to in the first letter. With respect to these documents, the Deputy Commissioner thus expresses himself :—

"The letters Alif and Bé remain for consideration as to the alleged admissions of trust. Alif was put in, it was said, only because it was referred to in Bé, so it will suffice to consider the value and effect of the latter. The Defendant, *Raghunath Kuar*, if she wrote this, informed the Plaintiff that she would do 'nothing contrary to the writing of the Thakur;' that he had been falsely informed that she meant to write a deed in favour of *Bisheshar Baxsh* (Defendant 4). A witness *Kunj Behari Lal*, deposes that he wrote Bé for the defendant, being at the time in her service; other witnesses depose that the signature to this letter is Defendant's. The letter is denied. It is pointed out that Alif and Bé were not filed with the plaint, nor alluded to in any way. This fact, a very important one, certainly renders the genuineness of these papers doubtful; whether genuine or not, Bé contains only a promise, and does not create any fiduciary relations, if none previously existed between the Plaintiff and Defendant. There is nothing in the promise which gives it any legal force."

He dismissed the suit.

The Commissioner who affirmed this judgment makes no distinct allusion to these letters.

The judgment of the Deputy Commissioner and the Commissioner being concurrent, no appeal lay to the Judicial Commissioner. The present appeal is brought from the judgment of the Commissioner.

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Although the Deputy Commissioner throws some doubt on the genuineness of the two letters,—chiefly, it would appear, on the ground that they were not filed with the plaint (they seem to have been filed before the settlement of the issues),—he does not reject them, but considers their effect. As several witnesses testify to the signature of the Defendant to “Bé,” and there is no contradiction of their testimony, and as *Janki Lal*, the writer of “Alif,” testifies to his own handwriting, their Lordships do not deem themselves justified, in the absence of a finding by the Court below that the witnesses were not to be believed, in rejecting the letters. “Be” is in these terms :—

“May God assist us. You will know the particulars from this letter and from that of *Janki Ram*.

“From *Thakurain Raghunath Kuar* to *Ramsarup Singh*.

“My dear *Ramsarup Singh*. After my good wishes to you, I pray God to keep us in good health.

“I have received your letter, have become acquainted with its contents, and have been satisfied. *Bhagwat Singh*, *Lalla Goorparshad*, *Pandit Goordyal Ram*, and *Chandka Singh* paid a visit to me in person, and related all the particulars to me verbally. The report that you have received from the second wife to the effect that I wish to make a bequest in favour of *Bisheshar* is altogether false ; she wishes to incite a quarrel between you and me. I do not wish to contravene the instructions given by my husband, either by thought, word, or deed. I am surprised that although I have twice represented to the Government authorities my intention to comply with the instruction imparted by my husband in favour of your father, you are not satisfied, and are easily led away by others. I beg to assure you that nothing will be done contrary to the will of my husband.

“You will learn the other particulars from *Janki Lal*’s letter. The rest is all right.

“Dated Asarh-Badi, 5th 1277 E. 18th June, 1870.”

J. C. "Alif" is in these terms :—

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"From *Janki Lall* to *Thakur Ram Sarup Singh*.

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"Sir,—After compliments, I beg to state that may it please God to keep you in good health, which is advantageous to me. Having taken leave of you, I arrived at *Sihipur* yesterday, and related all the particulars to *Thakurain Sahab-Lala Gur Parshad, Chandka Singh. Bhagwant Singh* and *Gurdial Ram* came to-day to the *Thakurain* with your letter to her, who is going to send you a reply. *Lala Gur Parshad* and *Gurdial Ram* will give you all the particulars verbally. *Thakurain Sahab* takes thousands of oaths to the effect that nothing will ever be done contrary to the written wishes of *Thakur Nihal Singh*, and that the second wife of *Thakur Nihal Singh* is trying to instigate a false quarrel between you and her, *Thakurain Sahab*. You may therefore rest assured that no other plan is set on foot. The *Thakurain* wishes to make over one or two villages to *Bisheswar* from the estate lying on the west, with your sanction, which, she says, will be obtained, so that there may be no dispute or litigation hereafter. The rest is all right.

"Dated Asarh Badi 5th, 1277 Fusli."

The proceedings in the suit of *Ramanath v. Raghunath*, referred to the tehsildar, wherein *Raghunath* insisted, and successfully, that she held under her husband's will, could not have been unknown to the rest of the family. The present Plaintiff, the remainder man, may well have relied on the expressed intention of *Raghunath* to observe that will, and may have therefore thought it unnecessary to dispute her claims to a sunnud. Their Lordships have already intimated their view of her letter of the 6th of January, 1861, viz., that it was a declaration of trust on behalf of those interested under *Nihal Singh's* will, including the remainderman. But it must be here noticed that the present Plaintiff, on the 9th of March, 1862, presented a petition wherein he ignored the will of *Nihal Singh*, and impugned as invalid this very declaration of trust, contending that he had a present right to the estate, or at the least was next in reversion to *Raghunath*.

If his case had rested here, their Lordships would not have been disposed to make in his favour a declaration of a trust which

he had expressly repudiated. But the letters "Alif" and "Bé" give a different aspect to the case. The order made after his petition is that he be directed to apply to *Raghunath*. What correspondence upon this took place between them can only be conjectured from these two letters. It would seem from them that the Plaintiff no longer disputed the life interest of *Raghunath* or the will of *Nihal Singh*, but had received some information that she intended to make an absolute gift of the estate, whereupon *Raghunath* refers to her representation to the Government of the 6th of January, 1861, and to some subsequent representation to the same effect, for the purpose of reassuring him of her intention to comply with her husband's will, and quieting his suspicions that she intended to avail herself of the full powers contained by her sunnud. According, then, to the evidence in this suit, *Raghunath* has herself given a significance to her declaration of the 6th of January, 1861, which still more clearly fastens upon her the obligation to abide by it. She treats it as a wrong done to her that she should be suspected of any intention of departing from her husband's directions. And this places it beyond doubt that the declaration in question, which, as before observed, does not expressly mention *Nihal's* will, is really founded upon it, and treats it as a direction obligatory in conscience if not in law.

Their Lordships, however, think that two concurrent declaratory suits were unnecessary at the present time, and that it would not have been unreasonable if the First Court had, as a matter of discretion, declined, under the circumstances, to grant declaratory relief to the more remote remaindermen. That, however, was not done. *Ram Sarap's* suit has been decided on the merits, and decided against him, as their Lordships think, wrongly. They will, therefore, humbly advise Her Majesty that the Appellant is entitled to the decree he asks, but without costs, nor do they give any costs of this appeal.

Solicitors for Appellants : *Watkins & Lattey*.

Solicitor for Respondents : *T. L. Wilson*.

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J. C.*
 1881
 Nov. 11. SIRDAR SUJAN SINGH DEFENDANT;
 AND
 GANJA RAM AND ANOTHER PLAINTIFFS.

ON APPEAL FROM THE CHIEF COURT OF THE PUNJAB.

Contract of Suretyship—Rights of Surety—Lex loci contractus.

In a suit to recover moneys which the Plaintiff had been compelled to pay upon the Defendants' breach of contract with the independent State of *Bhawalpur*, the Defendants pleaded that there had been no breach within the meaning of the contract of suretyship. It appeared that the whole arrangement had been made within the State of *Bhawalpur*, the authorities of which had put an end to the contract and enforced payment by the Plaintiff:—

Held, that the parties must be considered to have contracted according to the liabilities that would be incurred at *Bhawalpur*, and not with a view to the law of *British India*, and that the Plaintiff was entitled to recover.

APPEAL from a decree of the Chief Court (July 26, 1875, and in review Jan. 29, 1877), whereby the Defendants' appeal from the judgment of the Commissioner of *Mooltan* (April 15, 1875) was dismissed, and the Plaintiff's suit decreed in his favour.

The Plaintiff sued the Defendants to recover from them a sum of Rs. 9000 which had been advanced by the State of *Bhawalpur* to them upon a timber contract, and which he, as surety for the Defendants, had been compelled to repay to the State upon their breach of contract. The defendants denied that they had authorized him to be their surety, or that they had committed any breach of contract which justified the State in rescinding the contract, and exacting repayment. The Assistant Commissioner found that the Plaintiff had become surety for the Defendants, but not at the Defendants' request, nor upon any specific request of the Defendants' agent. He also found that the *Bhawalpur* State was not justified in rescinding the contract, and therefore dismissed the suit, but without costs. The Commissioner found

**Present*:—SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

that the Plaintiff became surety with the consent of the Defendants' agent, and that the Defendants indorsed and accepted the action of the agent, and received the money with notice of the terms upon which it was obtained. He remanded the case, however, for a decision upon the merits, as to whether the contract had been broken at all. The Chief Court accepted the finding of the Lower Courts, that the Plaintiff was a surety for the Defendants. Mr. Justice *Boulnois* was of opinion that upon the facts of the case there was sufficient evidence that the Defendants had broken their contract. Mr. Justice *Lindsay* thought that he was precluded from inquiring into this question as a matter of fact, being of opinion that the act of the State of *Bhawalpur* in rescinding the contract was one which the Civil Court was bound in law to accept without further question; *Bhawalpur* being an independent State. The result was that both Judges, though on different grounds, decreed for the Plaintiff for the whole of his claim except a sum of Rs. 350. A review was admitted, and Judge *Boulnois* on further consideration altered his former opinion, and agreed with the original Court that there had been no breach justifying the rescission of the contract. He therefore considered that the first decree should be restored, and the suit dismissed. Mr. Justice *Lindsay* adhered to his former opinion, upon which the application for a review was referred to a full bench. Upon the final argument, Mr. Justice *Boulnois* and Mr. Justice *Lindsay* adhered to their respective opinions, and Mr. Justice *Campbell* sided with Mr. Justice *Lindsay*. The result was that the review petition was dismissed, and the decree of the Chief Court stood affirmed. Against this decree and order this appeal was preferred.

Mayne, for the Appellant, contended that the Plaintiff did not become surety for the Defendants in such manner as to entitle him to recover in this suit, and otherwise that there had been no breach justifying a rescission of the contract and a payment by the Plaintiff. The Chief Court was wrong in law in holding that the act of the *Bhawalpur* State was conclusive as to such breach. On the evidence there had not been such breach as to justify the State of *Bhawalpur* in putting an end to the contract.

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J. C. The Respondents did not appear.

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The judgment of their Lordships was delivered by
SIR RICHARD COUCH:—

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The suit in this appeal was brought by *Hardyal Singh*, who has since died and is now represented by the Respondents, against *Makkun Singh* and the Appellant, *Sujan Singh*, to recover a sum of money which the Plaintiff said he had paid as surety, and was entitled to recover from them.

Mukhun Singh is since dead and his representative has not joined in the appeal. *Sujan Singh* is the son and representative of *Nand Singh*, who died before the suit.

The circumstances under which the Plaintiff became surety are, that on the 12th of November, 1869, *Nand Singh* and *Makkun Singh*, through their agent *Gormukh Singh*, entered into a contract with the political agent of the State of *Bhawalpur* to supply timber, the contract being that the timber should be supplied clear and without knots; that on its arrival at *Mooltan* it was to be examined there by a mistree appointed by the political agent, and after inspection was to be forwarded to *Bhawalpur*; that though the timber should be forwarded, yet, notwithstanding the approval of the mistree, the contractors would take back any timber which was disapproved by the State of *Bhawalpur*. Another clause, as to the place of depositing it, is not material; and the fifth was that the political agent would purchase the timber brought by the contractors to *Bhawalpur*, and rates of payment for it were specified. Nothing was said as to the quantity of timber which was to be supplied, nor as to the time during which the contract was to remain in force. It was only a contract to supply timber, and allowed the political agent, who represented the State of *Bhawalpur*, to take it or not according to his approval of it. It would appear that shortly after the making of the contract the contractors were desirous of obtaining an advance of money, and they applied to the political agent for it. The Plaintiff has given his account of the transaction; but as the political agent, Colonel *Minchin*, has also stated what took place, it will probably be better to refer to what he said. He was

examined as a witness, and said, in answer to the question, "On whose security did *Nand Singh* and *Makkan Singh* obtain an advance of Rs. 10,000 from the *Bhawalpur* State?"—"On the security of the Plaintiff, who was at that time confidential agent attached to my Court; the Defendants were introduced to me by the Plaintiff, who stated that they were the agents for the sale of timber belonging to the Maharajah of *Cashmere* and *Cashmere* subjects;"—"I at once accepted him as security, on the understanding that if the Defendants failed to carry out their contract, the Plaintiff should make good the balance of advance." In answer to a question in cross-examination he said, "The Plaintiff was in no way responsible for the fulfilment of the contract, but only for the repayment of the advance in case the contract should fail." The Plaintiff's statement was that he had a letter from the Defendants, asking him to obtain an advance on account of the contract; that the agent *Gurmukh Singh* asked for Rs.25,000, and he suggested that Rs.10,000 might be advanced; and that he went to Colonel *Minchin* on the day he received the letter. Colonel *Minchin* refused to advance the money unless on security, and the Plaintiff said he would be surety, and requested him to advance Rs. 10,000 for the present to enable the contractors to open their work. The money was advanced. The period for the supply of timber appears to have been during the cold season, when only it could be floated down the river, as it had to be for a considerable distance. The contractors supplied some timber. Part of it was received and part rejected; and complaints were made, no doubt, as to the quality of it. In September, 1870, Colonel *Minchin* called upon the Plaintiff to pay the balance which then remained of the advance of Rs. 10,000, after giving credit for the timber which had been received by the State, and which balance amounted, as Colonel *Minchin* says, to Rs.8860. 7a. He gave directions that this amount should be recovered from the Plaintiff; and it was recovered from him in the first instance, by his giving up jewels and different securities, which were valued at the sum to be recovered, which was ultimately realised from them. The Plaintiff was, in fact, obliged to pay the amount, as being the balance remaining of the advance; and this is what he now seeks to recover from the Defendants. The question is whether he is

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entitled to do so. The Lower Courts have decided that he is entitled. When the case first came before the Chief Court, one of the learned Judges was of opinion that, applying, according to his view, the law of British *India* to the case, there had been a breach of contract which justified the payment of the money by the Plaintiff; and therefore he, as surety, was entitled to recover it. The other learned Judge was of opinion that the act of Colonel *Minchin* as an act of State could not be inquired into; and that on this ground, the Plaintiff having been thus obliged to pay the money, he was so entitled. Consequently a decree was made in the Plaintiff's favour. There was then an application for a review, upon which the learned Judge, who had in the first instance thought the contract had been broken, after a discussion of the evidence, came to the contrary conclusion, and thought that the contract had not been broken, and therefore that the Plaintiff was not entitled to recover. The other learned Judge adhered to his opinion that the act of Colonel *Minchin* could not be disputed, and on its being referred to a third Judge he took the same view. The application for a review was therefore dismissed, and the decree was confirmed.

Their Lordships have now to consider whether this decree in favour of the Plaintiff ought to stand.

The contract under which the Plaintiff became the surety, and which is the contract that must really be considered in this case, was made in *Bhawalpur*, and the parties must be considered to have made it according to the liabilities that would be incurred there. Their Lordships do not concur in the view that when the surety comes to enforce his rights against the principals, the law of *British India* is to be looked at. They must see what was in the contemplation of the parties when they entered into the contract at *Bhawalpur*, and the evidence of Colonel *Minchin* puts it as high as it can be put in the Defendant's favour. He says that the Plaintiff was to be responsible for the repayment of the advance in case the contract should fail. The question is, whether the contract to supply timber has not failed within the meaning of the contract of suretyship. It is clear that when Colonel *Minchin*, in September, 1870, directed that the balance should be recovered from the Plaintiff, the contract had failed. It was put

an end to by a power which neither the Defendants nor the Plaintiff, the surety, could dispute. Colonel *Minchin* had power to put an end to the contract ; and if we look not merely to the power which he might have as political agent, but to the terms of the contract for the supply of timber, it would appear that he was entitled to do so. The contract was one which being indefinite in point of time, it would seem might be put an end to by either party. It was really only a contract to pay for timber supplied and accepted according to certain rates. Therefore, in this respect, if it were necessary to go into that question, he had power to put an end to the contract. Moreover, if their Lordships had thought it necessary to go into the question whether Colonel *Minchin* was justified in what he did, there is evidence that the contract had failed through the acts of the contractors ; that they had, according to Colonel *Minchin's* evidence, after offering a quantity of timber which had been rejected, as there was power to do, abandoned the contract, and they do not seem to have taken any steps insisting on the timber being received or to have sent other timber in its place. The evidence is, and there is no reason to doubt that it is true, that they had in fact done in the way of abandoning the contract what would have justified the political agent in treating it as at an end, and saying that the balance ought to be repaid to the Government. The agent had, under those circumstances, declared the contract at an end. In any view of the case, therefore, the balance of the advances ought to be repaid by the surety. And the surety having been compelled to pay the money is entitled to recover it from the Defendants.

Their Lordships think that the decree which was made in the first instance by the Chief Court, and confirmed upon the application for a review, was right ; and they will humbly advise Her Majesty to dismiss the appeal.

Solicitor for Appellant : *T. L. Wilson.*

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 Feb. 9. HIRA LALL PLAINTIFF;
 AND
 GANESII PERSHAD AND OTHERS DEFENDANTS.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Estoppel—Secondary Evidence.

In a suit to establish that an ikrarnamah between the original vendor and vendee of a taluqa was binding on the Defendant, and that he was bound thereunder to indemnify the Plaintiff for the payment of the Government revenue of his (the Plaintiff's) portion of the taluqa; it appeared that the Plaintiff and Defendant respectively derived title from the original vendor and vendee, that the ikrarnamah was not in evidence, but that in a suit between the same parties in estate, relating in a great degree to the same subject matter, judgment had been given in favour of the Plaintiff's predecessor:—

Held, that the Plaintiff had failed to prove his case. The judgment in the former case was ambiguous as to the extent and duration of the liability assumed by the vendee, and did not decide that the contract of indemnity should run with the land.

A Court which rejects an original deed as inadmissible, ought not to accept secondary evidence of its contents, and then construe a document which it declines to look at.

APPEAL from a decree of the High Court (July 10, 1879), affirming a decree of the Subordinate Judge of *Allahabad* (Feb. 26, 1879), which dismissed the Appellant's suit with costs.

The question in the appeal was whether the Appellant, who was the proprietor in possession of the lands in suit (being 422 bigahs), situate within the ambit of taluqa *Mawaiya*, and who had been by orders of the Commissioner and the Board of Revenue held responsible for payment of the rateable revenue payable thereon to the Government, was under the circumstances of the case entitled to have the amount of such revenue defrayed by the Defendants, the zemindars of the taluqa.

The taluqa was in 1830 sold by *Ghulam Singh* and others, the

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then zemindars thereof, to certain persons benamee for *Ghulam Ahmud*, the real purchaser and predecessor in title of the Respondents. The sale deed had never been produced, but the Appellant, who derived title from the vendors, alleged that it contained a condition to this effect, "That the vendor should remain in perpetuity in possession of 1,845 bigahs of land as malikana, without payment of rent and the rateable Government revenue, and the vendee and his representative should pay the Government revenue of the said land, together with that of the whole share sold; the vendors should have nothing to pay on account of the Government revenue thereof."

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The provisions of this deed, whatever they were, immediately gave rise to dispute, and on the 26th of April, 1831, an *ikrarnamah* relating to these 1,845 bigahs was executed between the parties to the sale deed. Neither in this suit, nor in a former suit in which a similar question was raised, had the *ikrarnamah* been put in evidence. All that was known of its contents was derived from the judgment of the Sudder Court in that former suit, dated the 14th of March, 1853, which, after rejecting the *ikrarnamah* as inadmissible because it had not been tendered in the Court below, based its decree in favour of the Appellant's predecessor in title upon secondary evidence of its contents. At the recent settlement the Appellant, on the petition of the Respondents, had been ordered to pay the Government revenue in respect of his holding.

The facts of the case appear in the judgment of their Lordships.

The prayer of the Plaintiff was:—

1st. That, in accordance with the original contract entered into between the contracting parties, the Plaintiff be exempted from paying the rateable revenue as against the Defendant without any injury to the Government.

2nd. That the Defendants be ordered to pay themselves as before the said revenue for the said *nankar* land, in accordance with the contract entered into by the original purchaser.

3rd. That the Defendants be further ordered never to claim and demand from the Plaintiff the revenue they may have to pay for the said land.

J. C. The written statement of the Respondents so far as it relates to
1882 the original contract was as follows :

HIRA LALL 6th. The Defendants, or the person whose representatives they
v. (Defendants) are, never remitted in perpetuity (naslan-bad-naslan)
GANESH the rent of any land to any predecessor of the Plaintiff, and even
PERSHAD. if the rent has been remitted the remission can legally be in
force as against the grantor personally ; it cannot be enforced
against his heirs and representatives.

7th. Even the decree of the Sudder Court relied upon by the Plaintiff has legally no connection with the order of the Settlement Court determining the rateable revenue, nor can it affect, under any law, the settlement order in dispute in this case, nor it is binding on the Settlement Officer.

Graham, Q.C., and Raikes, for the Appellant, contended that he was, under the circumstances of the case, entitled to be indemnified by the Respondents, and that the land in suit, into whosoever hand it might pass, was entitled to be indemnified by the zemindar of the taluqa for the time being, in respect of the Government revenue which was assessed upon the land in suit, and which its holder was legally bound to pay. Reference was made to *Packhouse v. Middleton* (1).

Leith, Q.C., and Cowell, for the Respondents, were not called upon.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER :—

This appeal comes before their Lordships under somewhat peculiar circumstances. The case of the Plaintiff, who is the Appellant, is in substance this : that in October, 1830, three persons, named *Sheo Ghulam Singh, Beni Singh, and Mardan Singh*, sold a taluqa to a person of the name of *Ghulam Muhammad*, reserving to themselves a certain portion of that taluqa, which is differently described as 1845 bigahs, and 1400 bigahs,—in fact, various figures are given describing it,—subject

(1) 1 Ch. C. 173, cited in Sugden's V. & P. (11th ed.) p. 728.

to this condition, that they were to pay no rent for this portion reserved, nor the Government revenue, but that the Government revenue was to be paid by the vendee. They say that by the conditions of the deed of sale, subsequently confirmed by an *ikrarnamah* of April, 1831, this was expressly agreed and stipulated on the part of the vendee. The Plaintiff is a purchaser of a part of the reserved portion, deriving title from the original vendors. The Defendant is a person to whom one *Dulham Begum* (who was the widow of a person named *Ghulam Ahmad*, for whom it is alleged that the original vendee purchased benamee), sold it—it does not appear when.

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The Plaintiff seeks to establish that the agreement between the original vendor and vendee is binding upon the present Defendants, and that they are bound to indemnify him, the Plaintiff, for the payment of the Government revenue in respect of the reserved property, or such portion of the reserved property as he possesses.

The Plaintiff does not put in the original deed,—that is said to have been in the possession of the original Defendants,—and he does not give, nor did he ever give, any satisfactory evidence of its contents. He does not put in the *ikrarnamah*, on which he principally relies as setting forth the agreement which has been referred to, and he gives no reason whatever for not producing it. He does not state whether or not it is in his possession; whether he has made any search for it; whether it is lost; nor does he attempt to give any secondary evidence of it, but he relies entirely upon a judgment which was obtained in the year 1853 by the original vendors together with another person against *Dulham Begum*, who has been before spoken of; and he contends that this judgment, without any other evidence whatever, proves his case.

This judgment turns chiefly upon the construction of the *ikrarnamah*. Their Lordships cannot help observing, in passing, on the extraordinary course which appears to have been pursued by the Court of the Sudder Dewani Adawlat in that suit. In the Court of first instance, the Plaintiff, although he admitted that he had the *ikrarnamah* in his possession, did not produce it, alleging that it had been in the possession of the Defendants, and that

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they might have tampered with it, or had tampered with it. But as he did not produce it, the Judge (it appears to their Lordships quite properly) held that secondary evidence of it could not be admitted, and dismissed the suit. When the case came on appeal to the Sudder Court at *Agra*, it seems that the Plaintiff did then produce this document, and offer it for the inspection of the Court. The Court refused to look at it, but admitted secondary evidence of its contents. It appears to their Lordships that the Sudder Court was wrong in that course of proceeding. If the Plaintiff had the original and did not produce it in the Court below, his case was not proved, because it rested almost entirely on the *ikrarnamah*, there being no evidence of the contents of the deed of sale ; but to accept secondary evidence of the document which was in the Plaintiff's custody, without looking at the original, seems to their Lordships to be an extraordinary course. But, be this as it may, the Plaintiff is right in contending that this was a suit between the same parties in estate, relating in a great degree to the same subject matter, and in relying upon it as far as he can as an estoppel. It remains to ascertain what the real effect of the judgment in that suit was. The claim was "for a declaration of right and proprietary possession, exempt from the payment of the rateable rent (by prohibiting the Defendant from demanding the rateable revenue)." And the point decided in the Sudder Court is thus stated :—"The Court, for the above reasons, reverse the decision of the Principal Sudder Ameen, and decree in favour of the Appellants for possession of the land, exempt from the payment of revenue and *wasilat* to the amount claimed by them."

It appears to their Lordships that this judgment is ambiguous in one or two respects. It does not appear definitely on the face of it whether it was adjudged that the claim to be indemnified for the payment of Government revenue related to the then impending revenue settlement which the parties may perhaps be assumed to have had in contemplation when they entered into the agreement, or whether it related to the next settlement or to any subsequent settlement. The judgment might be consistent with either view. Further, it does not appear whether the effect of the judgment is simply to render the Defendant, *Mussumat*

Dulham Begum, liable to indemnify the Plaintiffs in respect of the reserved rent, or whether the contract of indemnity is to be taken to run with the land, and to bind all persons who may be hereafter in possession of it under any title whatever. *Mussumat Dulham Begum*, it may be observed, as far as their Lordships are able to understand the evidence on this part of the case, which is as obscure as the rest of it, would seem to be, as has been said, the widow of *Gulam Ahmad*, the real purchaser, and thus to have been a representative of the purchaser bound by his undertakings, but it would by no means follow that the land is to be bound in whosoever hands it may hereafter come by purchase or otherwise. The judgment, thus ambiguous, is applied almost wholly to the construction of the *ikrarnamah*, which the Court did not look at. If this *ikrarnamah* had been produced in the present suit, their Lordships might, by applying the Judgment to the terms of it, have been able to determine the effect of that judgment ; but, in the absence of the *ikrarnamah*, which the Plaintiff has not produced, and the non-production of which he has not accounted for, their Lordships are unable to construe the judgment in the sense in which the Plaintiff seeks to have it construed. The more obvious interpretation of it seems to be the more limited one.

Under these circumstances, their Lordships are of opinion that the Plaintiff has failed to prove his case ; and they will therefore humbly advise Her Majesty that the judgment appealed against be affirmed, and that the appeal be dismissed with costs.

Solicitors for Appellant : *Watkins & Lattey*.

Solicitors for Respondents : *W. & A. Ranken Ford*.

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THE MUSSOORIE BANK, LIMITED . . . DEFENDANT;
AND
ALBERT CHARLES RAYNOR . . . PLAINTIFF.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

*Will—Construction—Precatory Trusts—Practice—Petition for Special Leave
—Mis-statement—Costs.*

A testator gave to his widow the whole of his real and personal property "feeling confident that she will act justly to our children in dividing the same when no longer required by her":—

Held, that the widow took an absolute interest, and that the doctrine of precatory trusts did not apply.

The petition of special leave to appeal in this case stated correctly two valid grounds for granting the same; but contained misstatements of fact which affected the third ground relied upon by the petitioner:—

Held, that any such petition is liable at any time to be rescinded with costs if it contains any misstatement or any concealment of facts which ought to be disclosed. It appearing however that there was in this case no intention to mislead, the appeal was heard and allowed, but without costs.

Ram Sabuk Bose v. Monomohini Dossee (1) approved.

APPEAL from a decree of the High Court (Aug. 22, 1878) reversing with costs a decree of the Subordinate Judge of *Dehra Doon* (May 10, 1878).

Special leave to appeal had been granted to the appellants by order of Her Majesty in Council dated the 14th of August, 1879.

Besides a question as to the effect of particular words in a will, whether or not they amounted to the creation of a trust, there was a further question raised as to the effect of certain misstatements which had been made in the petition for special leave to appeal.

Two suits had been instituted by the Appellant bank against Mrs. *Raynor's* executors prior to the suit in which this appeal arose. One was numbered 41 of 1876, and in it a money decree

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was obtained on the 5th of December, 1876, and certain *Delhi Bank* shares were attached. The other was a mortgage suit numbered 115 of 1876, and in it a money decree for Rs. 32,121 was obtained on the 12th of December, 1876, the High Court in appeal, by its decree dated the 2nd of January, 1878, holding that the bank might enforce its mortgage on certain properties to the extent of Mrs. *Raynor*'s interest thereon. The present suit, numbered 24 of 1877, was brought by the Respondent on the 16th of March, 1877, to set aside the attachment of the shares so far as it affected him. The suit was valued at Rs. 6,000, and was dismissed by the Subordinate Judge on the 10th of May, 1878, but decreed in favour of the Respondent on the 22nd of August, 1878, after the time for appealing from the decree of January 2, 1878, in the mortgage suit had expired.

The High Court refused to admit an appeal from the decree of the 22nd of August, 1878, to Her Majesty in Council on the ground that the property at stake in this suit was under the appealable amount.

The petition for special leave to appeal contained the following statements. After referring to the institution of the mortgage suit (115 of 1876), but without mentioning the date thereof or of the judgment of the High Court therein it proceeded:—"The High Court of *Allahabad*, without deciding this question, ordered that the interest of Mrs. *Raynor* in the properties should be sold in satisfaction of the claim of the bank under the decree in the above suit. The bank attached the shares of the *Delhi Bank* held by Mrs. *Raynor*'s executor and executrix, and the Respondent herein objected to such attachment on the same ground as above stated, viz., that Mrs. *Raynor* possessed only a life interest in the said shares; but his objection was dismissed. He thereupon brought the suit which is the subject of the present application. The suit was brought in the Court of Small Causes at *Dehra*, exercising its extraordinary jurisdiction, against the *Mussoorie Bank, Limited*, and prayed for possession of twenty-four shares of the *Delhi Bank*, attached under the above decree in the suit of *Mussoorie Bank v. Executors of Mrs. Raynor*, on the ground that under the will of her deceased husband Mrs. *Raynor* held them only for her own life, and in trust after her death for her

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J. C. children. The suit was valued at Rs. 6,000, and was numbered
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And further, the grounds suggested in the praying part of the petition, why special leave should be granted, were the following:—

"Pray that Your Majesty in Council will grant them special leave to appeal against the same on the ground that the decision, though actually only for a sum of Rs. 6,000, virtually affects the petitioners' right to have a mortgage security for the three promissory notes aforesaid, in respect of which a decree for Rs. 32,121. 2*α*. 4*ρ*. was awarded to the petitioners; also that the point of law decided by the High Court of *Allahabad* in this suit was one of great and general importance, and will govern other claims arising in reference to the estate of Mrs. *Raynor*, and that a decision of Your Majesty in Council in this suit will probably prevent any appeal against the decree in the suit brought by the petitioners as aforesaid, or against the proceedings in execution thereof."

Doyne, for the Respondent, referred to *Ram Sabuk Bose v. Monomohini Dossee* (1), and contended that the order granting special leave to appeal should be rescinded. The suit under appeal was brought to set aside an order made in the suit (41 of 1876), and the statement in the petition as to the relation between suit (115 of 1876) and the decision therein and the present suit is therefore incorrect and misleading. Owing to accident or negligence there was a misrepresentation of fact as to such relation, and a concealment of fact as to the date of the High Court's decree, and it was contended that had the true facts appeared on the petition the order for special leave would not have been granted.

Graham, Q.C., for the Appellant, contended that there was ample ground for granting the order for special leave, apart from the misstatements, which were unintentional. Affidavits had been filed to explain the manner in which they arose. They were immaterial in this sense, that if the facts had been accurately stated, it was still on the merits a case in which leave would have

been granted. Reference was made to *Mohun Lal Sookul v. Beebee Doss and Others* (1).

Doyne replied.

Their Lordships decided to hear the appeal.

Graham, Q.C., (*Woodroffe* with him), for the Appellant, contended that Mrs. *Raynor* took an absolute interest under her husband's will unaffected by any trust whatever in favour of the children. The Chief Justice in the Court below relied upon *Curnick v. Tucker* (2), but that case is distinguishable from this, and moreover in later cases a stricter view is taken of what are called precatory trusts : *Parnall v. Parnall* (3). Reference was also made to *Lambe v. Eames* (4), where the whole subject is reviewed by Vice-Chancellor *Malins*, and upheld in appeal (5). See also *Salc v. Moore* (6); *Stead v. Mellor* (7); *In re Hutchinson and Tenant* (8).

Doyne, for the Respondent, submitted that at all events the later cases cited did not get rid of the doctrine of precatory trusts, and that the true effect of the clause in dispute in this case was that the testator gave his widow the right of enjoyment for life with a power of appointment afterwards to be exercised in the mode prescribed, that is by fair division amongst the children. He says "all my estate." [SIR BARNES PEACOCK:—She may use it as required, may she not? SIR ARTHUR HOBHOUSE:—If he had given over what was not required, such gift would have been void for uncertainty.] No doubt there must be definiteness in the object and subject, and clearness as to the way in which it is to go. Here the object is "our children"—the way in which it is to go is by the exercise of the wife's power. The subject, moreover, is clearly defined in the clause. In this way *In re Hutchinson and Tenant* (8) is distinguishable. He referred to *Knight v.*

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(1) 8 Moore Ind. App. Ca. 195.

(2) Law Rep. 17 Eq. 320.

(3) 9 Ch. D. 96.

(4) Law Rep. 10 Eq. 267, 270.

(5) Law Rep. 6 Ch. 597.

(6) 1 Sim. 534.

(7) 5 Ch. D. 225.

(8) 8 Ch. D. 540.

J. C. *Knight* (1); *Le Marchant v. Le Marchant* (2); *Lambe v. Eames*
 1882 referred to in *Curnick v. Tucker* (3). There is no ground for say-
 — ing that this latter case has been overruled.

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The Appellant was not called on to reply.

The judgment of their Lordships was delivered by

SIR ARTHUR HOBHOUSE :—

In this case their Lordships have felt almost more difficulty in deciding whether or not to hear the appeal than they have in disposing of it when heard, and in order to shew the nature of that difficulty it is necessary to state the precise course which this litigation has taken.

In the month of December, 1839, Captain *William Raynor* died, having left a will which he expressed in the following terms:—"I give to my dearly beloved wife, *Mary Anne Raynor*, the whole of my property, both real and personal, including my Government promissory notes, *Delhi Bank* shares, my house at *Ferozepore*, No. 50, together with all my plate and plated ware, and whatever money, furniture, carriages, horses, &c., may be in my possession at the time of my decease, together with all moneys due or which may afterwards become due, feeling confident that she will act justly to our children in dividing the same when no longer required by her." And he appointed his son *William Joseph Raynor*, and his wife *Mary Anne Raynor*, to be his executors. Mrs. *Raynor* alone proved the will.

During her lifetime no question arose as to the true nature of Captain *Raynor's* will. It appears that she possessed herself of his property, and she assumed to deal with it as though it were her own. On the 5th of September, 1868, Mrs. *Raynor* made her will by which she gave to her son, *Albert Charles Raynor*, who is the respondent in this appeal, "24 of my shares in the *Delhi and London Bank*," and she also gave him a house and some land. Other property, consisting mainly of houses and land and of Government rupee paper, she gave partly to her daughter

(1) 3 Beav. 172 ; 9 L. J. (N.S.)
 (Ch.) 355.

(2) Law Rep. 18 Eq. 414.

(3) Law Rep. 17 Eq. 320.

Adelaide Louisa Swetenham, partly to her son *William Joseph Raynor*, and partly to her step-daughter *Elizabeth Goolding*. To the latter was given the house No. 50 at *Ferozepore*, which the testatrix describes as "my house and estate." Mrs. *Raynor* died some time in 1875, and her will was proved, it does not appear by whom.

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In the year 1876 the *Mussoorie Bank*, who are the Appellants, instituted two suits against Mrs. *Raynor*'s executors for the purpose of recovering the sum of Rs. 25,000 advanced by the bank to Mrs. *Raynor* upon the security of thirty *Delhi Bank* shares and of certain houses. One of these suits, No. 41 of 1876, was instituted in the Small Cause Court at *Dehra Doon*, and on the 5th of December, 1876, the bank obtained a decree under which the thirty shares were attached. The other suit No. 115 of 1876, instituted before the Subordinate Judge of *Dehra Doon*, was to enforce the bank's mortgage upon the houses. On the 12th of December, 1876, the bank obtained a money decree for the sum of Rs. 32,121. 2*a*. 4*p*., but the Subordinate Judge refused to give them any specific relief on the basis of the mortgage. His principal reason appears to have been that the nature and extent of Mrs. *Raynor*'s interest in the mortgaged properties was uncertain.

Against this decision the bank appealed to the High Court, who gave judgment on the 2nd of January, 1878. They held that Mrs. *Raynor* certainly had some interest in the properties she mortgaged to the bank; that she might have had an absolute interest in them, especially as she had acquired them after Captain *Raynor*'s death; and that the bank was entitled to enforce its security against whatever interests might ultimately prove to be hers. They varied the decree accordingly. As regards the interest which Mrs. *Raynor* had in the properties the High Court pronounced no opinion, holding, quite rightly as their Lordships think, that the question did not arise in a suit in which Captain *Raynor*'s estate was properly represented.

While the appeal in the mortgage suit was pending, *Albert Raynor* brought the present suit for the purpose of setting aside the order of the 5th of December, 1876, so far as regards the twenty-four bank shares bequeathed to him by his mother, and

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of obtaining possession of those shares. The identity of the shares with the shares bequeathed by Captain *Raynor* may be assumed for the present purpose; and the case made by the Respondent is that Mrs. *Raynor* took only a life-interest in her husband's property. On the 10th of May, 1878, the subordinate Judge dismissed the suit, holding that Mrs. *Raynor* took an absolute interest under her husband's will. *Albert Raynor* appealed, and on the 22nd of August, 1878, the High Court gave him a decree on the ground that Mrs. *Raynor* held her husband's estate, not absolutely in her own right, but as trustee for their children, with a power of appointment among them.

The bank then applied to the High Court for leave to appeal against this decree. On the 13th of January, 1879, the High Court refused leave on the ground that the property at stake in this suit was valued at no more than Rs. 6,000, and that the question of law was so clear that an appeal could only result in the affirmance of the judgment.

The bank then presented a petition to Her Majesty in Council for leave to appeal, on which leave was granted by an Order in Council dated the 14th of August, 1879: And it is the frame of that petition that gives rise to the preliminary question now raised. Waiving all questions as to the honesty of the petitioners, the Respondent's counsel insists that in fact their petition is so framed as to mislead this Board, and to bring it to a favourable decision on false grounds.

The petition states the petitioner's mortgage suit, number 115 of 1876, and it states the effect of the decree of the High Court therein; but it does not give the date of that decree. Then it goes on to state that under that decree the bank shares were attached; that *Albert Raynor* objected; that his objection was overruled; and that thereupon he brought the present suit. The proceedings in the present suit are correctly stated; but it is not true that the bank shares were attached under the decree in the mortgage suit, or that *Albert Raynor's* objection and suit directly struck at any portion of the decree in the mortgage suit. The shares were attached in the suit relating to them alone, which was valued at Rs. 6,000 only; whereas the mortgage suit was of greater value.

The first question is, whether the preliminary objection is taken too late. The order was made more than two years ago, and the Respondents were fully aware of it ; yet no objection was made until all the costs of the appeal had been incurred. As a general rule, the proper course, in a case like the present, is for the Respondent to move as early as possible to rescind the Order in Council ; and their Lordships think it right to call attention to the opinion expressed in the second volume of the Law Reports, Indian Appeals, p. 82. It is there said, " In their Lordships' opinion an objection of this kind ought to be taken by the Respondents as early as the matter is brought to their notice, for the plain reason, that if the leave to appeal is on that ground rescinded, no further costs are incurred : and it is wrong to leave the objection until the hearing of the appeal, when the record has been sent from *India*, and when all the costs attending the hearing have been incurred." At the same time their Lordships desire it to be distinctly understood that an Order in Council granting leave to appeal is liable at any time to be rescinded with costs, if it appear that the petition upon which the order was granted contains any misstatement, or any concealment of facts which ought to be disclosed.

In this case, if their Lordships had any reason to think that there were intentional misstatements in the petition, they would at once rescind the order and dismiss the appeal. But they do not think there was any intention to mislead. The Appellant's solicitor has filed an affidavit shewing how he confused the decree of the 12th of December made in the mortgage suit, with the decree of the 5th of December under which the shares were attached ; and it appears that he did not leave the judgment of the 12th of December to be explained solely by the petition, because a copy of it was among the papers put in with the petition. Still if there had been a material misstatement, it is not sufficient to clear the case of bad faith. To use the words of Lord *Kingsdown*(1), "Where there is an omission of any material facts, whether it arises from improper intention on the part of the petitioner, or whether it arises from accident or negligence, still the effect is just the same if this Court has been induced to make an order

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(1) *Mohun Lal Sookul v. Beebee Doss and Others*, 8 Moore, Ind. Ap. Ca. 195.

J. C. which, if the facts were fully before it, it would not, or might not
 1882 have been induced to make." Their Lordships therefore proceed
 — to ask whether the order in question was one which they might
 MUSSOORIE not have been induced to make if the facts had been fully and
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The grounds w hich the petitioner relies on as reasons why an appeal shall be allowed, notwithstanding the value of the suit is only Rs.6000, are three in number : first, that the decision virtually affects the right of the bank to have a mortgage security for the whole sum of Rs.32,000 odd ; secondly, that the point of law decided by the High Court will cover other claims arising in reference to the estate of Mrs. *Raynor* ; and thirdly, that the decision on appeal in this suit will probably prevent any appeal against the decree in the mortgage suit, or against the proceedings in execution thereof. Their Lordships consider that the first two grounds are solid grounds for granting the leave asked ; and they are not at all affected by the error in the petition. It is clear that if Mrs. *Raynor* took only a life interest in her husband's property, the bank cannot enforce their decree against any portion of the property enjoyed by her in her lifetime, whether comprised in the mortgage or not, unless they successfully contest against the *Raynor* family, as to each such portion, the question whether or no it belonged to Captain *Raynor* or was purchased with his assets. The third ground is affected by the misstatements in the petition ; first, because the date of the decree in the mortgage suit is not given, and therefore it does not appear on the face of the petition that the time for appealing had, as in fact it had, then expired ; secondly, because the decree obtained by *Albert Raynor* appears to be more directly mixed up with the mortgage suit when it is stated that the shares were attached under that very decree, than when they are shewn to be attached under a decree in a different suit. Still there is a sense in which the third ground may be explained. It is impossible to suppose that, after the decision of the High Court in this suit, any effectual proceeding could be taken by way of simple execution of the decree in the mortgage suit, for all purchasers would be deterred by the knowledge that they were buying a formidable litigation. It certainly would be necessary for the bank to frame a new suit properly constituted

for the purpose of contesting all questions with the *Raynor* family and seeking execution of their decree against them. In such a suit as that, the construction of the will might, and probably would, be brought by appeal before this Board. And it might possibly, though probably it would not, be found necessary for properly working an appeal in a subsidiary suit of that kind to obtain leave to appeal from the original decree the execution of which was being prosecuted.

Their Lordships are of opinion that the petition is very faulty, and that due care was not shewn in its preparation; but on examining the grounds for asking leave to appeal, they do not think that any different conclusion would or could have been arrived at if the strictest accuracy had been observed. Their Lordships also were, when hearing the preliminary objection, strongly impressed with the circumstance that there was *prima facie* strong ground for an appeal upon the merits. For these reasons they have thought it right to hear the appeal.

Passing to the merits of the case, their Lordships are of opinion that the current of decisions now prevalent for many years in the Court of Chancery shews that the doctrine of precatory trusts is not to be extended; and it is sufficient for that purpose to refer to the judgments given by Lord Justice *James* in the case of *Lambe v. Eames* (1), and by Sir *George Jessel* in the case of *In re Hutchinson and Tenant* (2). They are further of opinion, that if the doctrine of precatory trusts were applied to the present case, it would be extended far beyond the limits to which any previous case has gone. No case has been cited, and probably no case could be cited, in which the doctrine of precatory trusts has been held to prevail when the property said to be given over is only given when no longer required by the first taker.

Now these rules are clear with respect to the doctrine of precatory trusts, that the words of gift used by the testator must be such that the Court finds them to be imperative on the first taker of the property, and that the subject of the gift over must be well defined and certain. If there is uncertainty as to the amount or nature of the property that is given over, two difficulties at once arise. There is not only difficulty in the execution of the trust

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(1) Law Rep. 10 Eq. 267; 6 Ch. 597.

(2) 8 Ch. D. 540.

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because the Court does not know upon what property to lay its hands, but the uncertainty in the subject of the gift has a reflex action upon the previous words, and throws doubt upon the intention of the testator, and seems to shew that he could not possibly have intended his words of confidence, hope, or whatever they may be,—his appeal to the conscience of the first taker,—to be imperative words.

In this case nothing is given over to the children of the testator except by an expression of confidence in his wife that she will deal justly in dividing the property among them, and that she will do it when the property is no longer required by her. If the testator had given to his children such property as was not required by his wife, or if he had given over his property if it was not required by his wife, the gift over would, according to a very well-known and well-established class of cases, have been void, because of the uncertainty. It would have been void, not merely because the words of gift over were precatory only, but it would have been void notwithstanding that the most direct and precise words of gift over might be used. Their Lordships think that substantially the words "when no longer required by her" must in this will be taken to have the same meaning as if he had said, "I give to my children so much as is not required by her." Considering the nature of the property, which includes a number of articles as to some of which the use is equivalent to the consumption; to the nature of the first gift, which, although not expressed in terms to be an absolute gift, is quite unlimited, and is legally an absolute gift; and to the fact that the first gift is only cut down by words which do not constitute a direct gift, but are to operate through an influence upon the conscience and feelings of the wife, their Lordships cannot come to any other conclusion than that the testator intended his wife to use the property according to her requirements. That is equivalent to an absolute gift to the wife.

They do not think it necessary therefore to enter into a consideration of the various authorities which have been cited as to the application of the doctrine of precatory trusts, or nicely to weigh one authority against another. They consider it sufficient to say that upon this will the wife took an absolute interest, and

that to apply the doctrine of precatory trusts to it would be a very large extension of that doctrine.

The result is, that their Lordships will humbly advise her Majesty to reverse the decree of the High Court, and to substitute for it a decree dismissing the appeal to the High Court with costs; but with respect to the costs of the present appeal they think it right to follow the case, from which a citation has already been made, in the second volume of the Law Reports, Indian Appeals, of *Ram Sabuk Bose v. Monomohini Dossee*; and having regard to the nature of the petition presented for leave to appeal, and the course pursued by the Appellants, they will give no costs of the appeal. The money which has been deposited will be returned to the Appellants.

Solicitors for Appellants : *W. Carpenter & sons.*

Solicitors for Respondent : *Watkins & Lattey.*

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April 20. HURRO PERSHAD ROY CHOWDHRY . . . PLAINTIFF;
 AND
 GOPAL CHUNDER DUTT AND OTHERS . . . DEFENDANTS.

ON APPEAL FROM THE HIGH COURT AT CALCUTTA.

Limitation—Bengal Act VIII. of 1869, s. 29.

The limitation prescribed by *Bengal Act VIII. of 1869, s. 29*, is not prevented from running in favour of a tenant during the period that a suit in ejectment is pending against him.

Ranee Surnomoyee v. Shooshee Mokhee Burmonia (1) considered.

APPEAL from a decree of the High Court (May 16, 1878), which affirmed a decree of the Subordinate Judge of the 24 Pergunnahs (Nov. 20, 1876), whereby the Appellant's suit was dismissed.

The suit was instituted in 1876 to recover from the Defendant, who held certain tenures called chuckdari tenures within the Plaintiff's zemindari, the rents of those tenures from April, 1866, to July, 1872.

The Defendants contended, and both the lower Courts held, that the suit was barred by limitation under *Bengal Act VIII of 1869, s. 29*.

The Appellant contended that his right to demand payment of those rents was in fact suspended by the continuance in *India* of the litigation referred to in the judgment of their Lordships, down to the date of the decree of the High Court therein, dated July 25, 1876, and that consequently the arrears sued for did not properly speaking become due until the date of that decree; and he relied upon the judgment of the Privy Council in the case of *Ranee Surnomoyee v. Shooshee Mokhee Burmonia* (1).

The material part of the judgment of the High Court was as follows:—

“That judgment (1), properly understood, is, in our opinion, wholly inapplicable to a case like the present.

* *Present* :—SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

" Here the Plaintiff, whose ancestor purchased the rights of Government in 1860, ought to have known, when the Defendants' ijara came to an end in 1866, what his true position was as against the Defendants. The Defendants set up against him these chuckdari tenures; and, if the Plaintiff had made proper inquiries he might have ascertained whether those tenures really existed. But he chose to ignore them, and to sue the Defendants (improperly, as it has turned out) for khas possession of the talook; and it is not because he has made a mistake, and by that mistake put the Defendants to the cost and inconvenience of a long litigation, that he has a right now to claim immunity from the provisions of the *Limitation Act*.

" If that were so, any man who mistakes his proper rights and remedies, might, with equal justice, claim exemption from these provisions.

" Take the ordinary case of a landlord giving his ryot notice to quit, and at the expiration of that notice bringing a suit to eject him. The ryot sets up a right of occupancy; and the landlord, after a litigation extending over four or five years, is eventually defeated upon that ground. Could the landlord, under such circumstances, sue to recover rent from the ryot, which accrued four years previously, and contend that he was not bound by time, because he could not pursue his claim for rent and his claim for ejectment at the same time? In our opinion, certainly not. Such a case would be entirely different from that decided by the Privy Council. If a landlord could recover back rents under such circumstances, he would be taking advantage of his own mistake, to relieve himself from the law of limitation.

" In this case the Plaintiff ought to have known in 1866 what his true position was as against the Defendants. Instead of treating them as tenants, and claiming from them the rents which they would probably have paid, he brought a suit against them for khas possession. Having failed in that suit, he is now trying to recover the rents as from 1866. We think he was clearly barred.

Doyne, for the Appellant, contended on the authority of the case in 12 *Moore*, that so long as the former litigation continued, no rent was, as between the Appellant and Respondents, due and

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recoverable. In that litigation the Appellant *bona fide* denied the validity of the chuckdari tenures, and consequently the obligation of the Defendants to pay him rent. Until the existence of the tenures was ascertained it was premature to sue for rent, and the statute did not run. Reference was made to *Bengal Act VIII. of 1869*, ss. 58, 59, and 61.

The Respondents did not appear.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER :—

In this case the sole question is as to the application of the law of limitations. The claim is for rent from April, 1865, to June, 1872. The terms of the 29th section of Act VIII. of 1869 of the *Bengal Council* are these: "Suits for the recovery of arrears of rent shall be instituted within three years from the last day of the *Bengal* year, or from the last day of the month of Jeyt of the Fuslee or Willayuttee year in which the arrear claimed shall have become due." It is admitted that in this case the suit was not instituted within three years from the end of the year when the last rent became due, and therefore *prima facie* it is barred by the law of limitation. This *prima facie* case is endeavoured to be answered in this way: The Plaintiff says that in 1874, that is to say, two years after the last instalment of the rent sued for had accrued due, the statute ceased to operate, because he instituted a litigation which had the effect of preventing it from running, and that therefore a portion at least of his claim is not barred. That litigation was this: He brought three suits in the year 1874 against the tenants with respect to whose arrears of rent the present action is brought, for the purpose of ejecting them from their holdings, which were called chuckdari holdings, in a certain zemindary of which he was possessed. These suits were dismissed by the First Court, and on the 25th of July, 1876, by the Appeal Court, on the ground of limitation. On the 7th of September, 1876, the Appellant commenced the present suit, concurrently with which he prosecuted an appeal to Her Majesty in Council from the decree of the 25th of July, 1876. His appeal was dismissed on the 26th of May, 1881.

The Appellant contends that the statute did not run against

his claim for rent after the year 1874, when he commenced these suits ; and for that proposition he relies solely on the authority of the case of *Ranee Surnomoyee v. Shooshee Mokhee Burmonia*(1). Both Courts in *India* have decided against the Appellant upon the ground that the statute applies, and that his case does not come within the exception to the operation of the statute established in the case of *Ranee Surnomoyee*—an exception rather apparent than real.

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The effect of that case may be very shortly stated. The zemindar brought a certain putni talook to sale and sold it to a purchaser who was put in possession of it, and out of the purchase-money the arrears of rent were paid. Subsequently this sale was set aside for irregularity ; the zemindar had to refund the purchase-money received by her, and the putnidar who succeeded in setting it aside obtained also the mesne profits for the time during which he was ousted. Under those circumstances this committee, whose judgment was delivered by Sir *James Colvile*, observed : "It is clear that until the sale had been finally set aside, she"—that is, the Plaintiff—"was in the position of a person whose claim had been satisfied, and that her suit might have been successfully met by a plea to that effect." In other words, the effect of the judgment of this Board is, that under the peculiar circumstances, the putnidar having recovered possession together with mesne profits, it was equitable that he should pay the amount of rent which was in arrear ; but that amount of rent did not accrue until the sale of the putni had been set aside, and therefore until that time the statute could not run. This examination of that case shews it altogether to differ from the present. Here there was no period of time in which the rent could not have been recovered. There was no period of time in which, therefore, the statute might not have run.

This case, therefore, being inapplicable, and no other case being relied upon, their Lordships have only humbly to advise Her Majesty that the judgment appealed against be affirmed, and that this appeal be dismissed.

Solicitors for the Appellant : *Barrow & Rogers*.

(1) 12 Moore's Ind. Ap. Ca. 244.

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April 25, 26.

PURMANUNDASS JEEVUNDASS (DE- } APPELLANT ;
FENDANT)

AND

VENAYEKRAO WASSOODEO (PLAIN- } RESPONDENTS.
TIF) AND THE ADVOCATE-GENERAL }
FOR BOMBAY (DEFENDANT)

ON APPEAL FROM THE HIGH COURT AT BOMBAY.

Charitable Trusts—Dedication—Effect of Agreement.

Where certain specific property (part of a testator's estate) had been set apart by the executors to answer the charitable trusts created by his will, and the residue of his estate had been made over to the Appellant (residuary legatee and heir) who ratified such arrangements by deed and himself became a trustee :—

Held, that there had been a valid dedication to charitable purposes of the said property, whether or not the will, having regard to the testator's proprietary right, was originally operative for that purpose as against the heir.

APPEAL from a decree of the High Court (Jan. 18, 1879), affirming a decree of a single Judge (March 7, 1878) whereby it was declared that the charity, the subject of the litigation, was well established.

The charity was created by the will of one *Runchordas Cunjee* of *Bombay*, who died on the 14th of May, 1849, having appointed the Respondent and others his executors, and leaving his nephew the Appellant (who was also his residuary devisee and legatee under the will) his heir.

The suit was instituted on the 8th of April, 1876, against the Appellant and others for the appointment of a new trustee or new trustees (the original number having been reduced by death and otherwise) to carry out the trusts of the charity and for incidental relief.

It was contended by the Defendant (the Appellant) that the

* *Present* :—SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

will was void by Hindu law as against him on the ground that the testator and his brother *Jeevundass* (the Appellant's father) who predeceased the testator, were members of an undivided Hindu family and that the joint family property was wholly ancestral, and that the testator had no property on which his will could operate.

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The substantial questions involved in the appeal were (1) whether the Appellant in this appeal was in virtue of the will or otherwise bound to recognise and give effect to the above charitable direction or bequest contained in the will, which was for the erection and maintenance of a *dhurumsala* to serve as a lodging for *Sadhoos* and *Sants*; (2) whether in case of his being so bound an order made upon him in this action for the delivery to the Accountant-General of the High Court of Judicature at *Bombay* of certain Government promissory notes to the nominal value of rupees one lac fifty-seven thousand two hundred was under the circumstances right and proper.

The directions in the will and the transactions which took place subsequently to the testator's death and related to the charity are set out in the judgment of their Lordships.

Fooks, Q.C., and *Scoble*, Q.C. (*W. Fooks* with them), for the Appellant, contended that the testator was a member of a Hindu family, joint in food, worship, and estate, consisting originally of himself and his brother, their father, and two uncles, and the Appellant, and governed by the Hindu law prevailing in the *Bombay* Presidency. The presumption was in favour of the family being joint and the estate ancestral and there was no evidence to the contrary. Even if on the evidence the testator had acquired any portion of the estate, such portion was very small. The Courts below should have ascertained the amount and value of such self-acquired estate and that it was sufficient to answer the testator's debts and legacies including the charitable bequest. The property being ancestral it was *ultra vires* for the testator to dispose of it by will. It survived to the Appellant. There being no obligation cast upon the Appellant by the will to establish the *dhurumsala* unless to the extent of such self-acquired property (if any) as came to Appellant's hands for that

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purpose, neither was any obligation cast upon him by the deed of conveyance and release dated the 11th of May, 1870, nor by the family agreement of the 6th of November, 1873, nor by the charity management trust deed and other documents executed contemporaneously therewith. It was also contended that such deeds did not operate by way of estoppel or involve any admission by the Appellant of such obligation. The release itself on its true construction, and having regard to the proviso, does not extend to ratify any acts of the executors which were beyond their authority, or to release them from any liabilities which they have incurred.

Leith, Q.C., and C. Parke, for the Respondent, *Venayekrao Wassoodeo*, were not called on.

The judgment of their Lordships was delivered by

SIR ARTHUR HOBHOUSE :—

The suit which gives rise to this appeal is founded on the will of one *Runchordass Chuttoor*, who was a merchant carrying on business in the city of *Bombay*. By his will he devoted a lac of rupees to the establishment and maintenance of a *dhurumsala* in *Bombay* for the benefit of *Sadhoos* and *Sants*. The Plaintiff and the present Respondent is one of the trustees named in the will, though he appears never to have acted in the trusts until he came forward to institute the present suit. His plaint is very brief. It consists substantially of a statement of the will; and a further statement that the directions of the testator were carried out by the acting executors, and that the *dhurumsala* was founded and endowed in compliance with those directions. Then he shews how it is that new trustees are wanted, and he prays that a new trustee or trustees be appointed under the order and direction of the Court to carry out the trusts "hereinbefore mentioned," meaning the trusts of the will. He prays no other specific relief; and the Court, in granting the relief that he prays for, have only made such declarations and given such consequential directions as are necessary for the purpose of that relief.

The Appellant, who was Defendant in the suit below, is the son of the testator's only brother, who was dead at the date of the will;

and the testator mentions the Appellant as being to him as a son. Either as heir or as the residuary devisee and legatee of his uncle the testator, he is entitled to the whole residue of the testator's property. He resisted the appointment of new trustees, and in his written statement he grounded his objection on the allegation that the will of the testator is void and inoperative under the Hindu law. He contended that no effect should be given to the provisions thereof, except to such extent and in such manner as he, the Appellant, might consent and agree that the same should be effective. The meaning of that plea is further explained in the written statement, and by the evidence and arguments in the case. In effect the Appellant contends that the property of which the testator was in possession during his lifetime was joint family property, and that under the provisions of the Mitakshara law the testator had no power of disposing of it to the dhurumsala or other charitable objects indicated by his will.

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In the decree pronounced at the hearing by Sir *Charles Sargent* the High Court has declared that the charitable trusts in the will of the testator *Runchordass* are well established, and that certain sums of money ought to be applied for the several charitable purposes mentioned in the will. It then goes on to order the Appellant to deliver to the Accountant-General certain notes and securities which have been earmarked as the property belonging to the charitable trust, and it appoints two persons to be trustees jointly with the Respondent, and declares that the Appellant is entitled to share with the trustees in the management of the charity. That is substantially the whole of the decree. The question is whether it is right. The Appellant was dissatisfied with it, and he appealed to the Court of Appeal. His appeal there was dismissed, and he is now appealing to Her Majesty in Council.

There has been a considerable amount of argument, both in the Courts below and at the Bar here, upon the question whether or no the testator *Runchordass* had such an ownership of this property as entitled him to devote a lac of rupees to the charity in question. Their Lordships are not disposed to express any opinion upon that point, because they consider that if it were held that the power of the testator was doubtful, or even that it

J. C. did not exist, the case must still turn upon the effect of trans-
 1882 actions which have taken place since his death.

PURMA- Those transactions are partly stated in and partly summed up
 NUNDASS and completed by a deed which was executed on the 11th of May,
 JEEVUNDASS 1870. For the purpose of seeing the exact effect of that deed it
 v. will be desirable to state what are the provisions of the testator's
 VENAYEK- will. The will was made on the 12th of May, 1859. The testator
 RAO recites that his only brother *Jeevandass* is dead, and has left a son
 WASSOODEO. of the age of about eight years, and that the testator himself has
 no issue. Therefore he says that the Appellant, being considered
 by him as a son, has a right of inheritance to the whole of the
 movable and immovable property ; and when he attains the age
 of twenty-one years the executors appointed in the will shall
 entrust to the Appellant the whole of the testator's property,
 movable and immovable, that may remain after defraying the
 expenses agreeably to all the conditions stated in the will. Then,
 after certain provisions for members of the family, he provides for
 the dhurumsala as follows :—" One month after my death a piece
 of ground shall be purchased in *Bombay*, and a dhurumsala be
 erected thereon to serve as a lodging for the Sadhoos and Sants.
 A sum to the extent of Rs.25,000 shall be expended thereon, and
 Government notes for Rs.75,000 shall be purchased for the main-
 tenance of these Sadhoos and Sants, and that the maintenance
 expense shall be defrayed out of the amount of interest that may
 be realized therefrom ; and all the executors appointed in my
 will shall, up to the time *Bhai Permanundass* attains the age of
 twenty-one years, conduct the management of this dhurumsala,
 and they shall, as long as the sun and moon exist, defray the
 expenses of the said dhurumsala out of the above-mentioned
 fund ; and even after *Bhai Permanundass* shall have attained the
 age of twenty-one years, these executors and said *Bhai* shall
 jointly conduct the management of this charity. Perchance
 should any one of these executors die, so long as three of those
 persons are alive they and *Bhai Permanundass* shall jointly con-
 tinue to conduct it, and even should any of them die, such of
 these executors as may be surviving shall appoint a respectable
 and good man of my caste as a vakel ; and they shall conduct
 the management of the said dhurumsala." It seems that by the

word "vakel" there the testator meant a representative or an executor. It appears that the will was written in the Gujrati language.

The testator died two days after the date of his will. The executors named in the will are five persons:—*Bhai Lukmidass Damji*, who has been the principal acting executor, and who acted up to and after the year 1874, but who is now dead; *Shah Bhanabhai Dwarkadass*, who also acted in the trusts of the will, but he became blind and desired to be discharged in the month of September, 1874; *Bhai Jairaz Chapsi*, who also acted in the trusts of the will, and died on the 6th of June, 1873; and the other two are, one *Parsi Dhanjibhai Framji*, who has never acted at all, and the Respondent, whose position has been mentioned before.

It appears from the deed of the 11th of May, 1870, that the affairs were managed by the three acting executors up to that time, and at that date the Appellant had attained the age of nineteen years. He had not attained the age of twenty-one, at which time the testator said the property was to be transferred to him; but he was some years past his majority, and as there was no contingency in the gift on his attaining twenty-one and no gift over, he would clearly be entitled upon his majority to have the affairs of the estate adjusted, and to have so much as was attributable to clear residue handed over to him. The adjustment was made by this deed of the 11th of May, 1870, and it is necessary to state it with some particularity. The parties to it are the three executors who proved and acted of the first part, and the Appellant of the second part. First come several recitals of the state of the family and the property previous to the testator's will. Then the will is recited, and it is stated that the executors have acted in execution of the different trusts of the will. Then follow these recitals:—"And whereas the said *Purmanandass Jeevundass*, being satisfied with the management and administration of the aforesaid estates and property by them the said parties hereto of the first part, and the said parties hereto of the first part being willing to make over and assign to him, in manner hereinafter mentioned, the said estates and property remaining in their hands, not subject to charitable and other trusts, has agreed to

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—

execute the release and covenant hereinafter contained. And whereas the said parties hereto have in their possession as such executors as aforesaid the several particulars of movable and immovable estate mentioned in the several schedules hereto"—then the deed goes on to make some statements concerning the schedule, and amongst them is this, that in part 6 of Schedule A. are "certain Government promissory notes and shares and sums of cash which have been appropriated to the respective trusts and purposes in the same part 6 of the same schedule respectively mentioned." Turning to part 6 of the schedule, it is found that the promissory notes, shares, and cash therein mentioned are all appropriated to certain charitable trusts. They are headed as being "appropriated to trust." There are several trusts, but with reference to the *dhurumsala* occurs the following passage:—"The following charitable places and charities to be carried on by the parties to these presents jointly:—(Sadavut) charitable place at *Cowasjee Patell* tank of *Runsordass Chanjee*, where at present the Sadhoos, Bhattas, and Brahmins are feasted. Promissory notes and ready cash and documents of properties relating to this account are now in possession of the three executors." Then the schedule goes on to mention another charity, which has been spoken of as the *Purshotum* Charity. Returning to the body of the deed, we find further recitals as to certain amounts advanced on two mortgages, and then comes the witnessing part. That consists of the formal transfer of the various properties, excluding those contained in part 6 of Schedule A. After that has been effected, comes a release by the Appellant of the three executors, which is in these terms:—"And this indenture also witnesseth that, in consideration of the premises, he the said *Permanundass Jeevundass* doth hereby release the said *Luckmidass Danjee*, *Dhanabhoy Dwarkadass*, and *Jairez Champsey*, their and every of their heirs, executors, administrators assigns, and effects, from all and all manner of sums of money, actions, suits, accounts, claims, and demands for and in respect of the administration, disposition, and application of the property, estate, and effects of the said *Kahanjee Chattoor*, *Runchordass Kahanjee*, and *Jeevundass Kahanjee*, or any part thereof, or for or in respect of any sale, loan, investment, act, or thing made, done,

or executed, or neglected or omitted, by the said *Luckmidass Damjee*, *Dhanabhoy Dwarkadass*, and *Jairez Champsey*, or any of them, in or about the property, estate, effects, or affairs of the said *Kahanjee Chattoor*, *Runchordass Kahanjee*, and *Jeevundass Kahanjee*, or any of them, or any part thereof, or in execution of the said recited wills or either of them, or in relation thereto, and for or in respect of any other thing in anywise relating to the premises." Then follows this proviso, on which the Appellant greatly relies:—"Provided always that nothing herein contained shall operate to release the said parties hereto of the first part, their heirs, executors, administrators, assigns, or effects, from any liability arising either under any covenant herein contained,"—that refers to covenants againts incumbrances and for further assurance —"and on their part to be observed and performed, or under any of the trusts appertaining to the property, estate, and effects respectively mentioned and described in the 6th part of Schedule A. to these presents, or otherwise relating to the same property, estate, and effects respectively."

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It does not appear to their Lordships that that proviso has any effect in cutting down the general ratification by the Appellant of those actions of the executors with which he is said to be entirely satisfied. It seems to them that it is the ordinary case of a property not wholly administered, but so far administered that the executors are entitled to a release from the residuary legatee. In point of fact this property cannot be wholly administered at any time, because some of the trusts are perpetual. But it was administered so far as this, that the executors found themselves in a position to hand over the residue, which seems to have been very large,—eight or nine lacs of rupees,—to the residuary legatee, he undertaking to answer all remaining legacies and trusts for private persons to which the property was liable, and the executors retaining so much as was necessary to answer the purposes of the permanent or charitable trusts which remained to be performed. From these trusts of course the Appellant could not possibly release the executors ; and it appears to their Lordships that this proviso, of which so much has been made, is the ordinary proviso which conveyancers, perhaps needlessly, are apt to put into a deed of release of this kind, merely for the purpose

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of shewing that the residuary legatee does not release, and does not affect to release, the executors from those trusts which yet remain to be performed. Therefore the effect of this deed is that the testator's estate is up to this point settled. Certain specific property is set apart to answer the charitable trusts, and by reason of its being set apart the executors find themselves in a position to put the Appellant in possession of the residue. Not only is the specific property set apart and ear-marked as applicable to the trust, but the Appellant himself becomes the trustee of it. By the words of the schedule he undertakes to act jointly with the executors as a manager of the charities: "The following charitable places and charities to be carried on by the parties to these presents jointly."

The effect of this is to make a valid dedication to charitable purposes of the property which is specified in the 6th part of Schedule A. It has been said in argument that all that this deed amounts to is only a statement of what the executors have done, and it is suggested that they have done it against the will of the Appellant. All that their Lordships can say to that is, that it is directly contrary to the expressions of the deed. According to the deed the Appellant is perfectly satisfied with what has been done, and he is glad to have this property set apart and to receive all the residue himself; and he undertakes to join in the management of the dedicated property for the benefit of the charities. Whether the Appellant conceived that he was legally bound to acquiesce in the executors setting apart this property owing to *Runchordass*' power over it; or whether he considered that it was doubtful whether he was legally bound, but that, owing to that doubt and owing to the respect due to his uncle, he ought to have the property set apart; or whether he considered that he was under a moral obligation only; it is clear that in point of fact he did join in an arrangement by which there was a perfectly good dedication to charity. Now that arrangement cannot be altered; nobody has the power to alter it. It is said that the execution of this deed amounts only to that which is technically called an estoppel, which operates only between parties and privies to the deed. The absurdity of that position was exposed at once by the supposition that *Luckmidass*, who is a party to this deed, should

have lived up to the present moment instead of dying. In that case Mr. *Fooks* was fain to admit that an estoppel would operate; but it is impossible that the true owners of this property can be damnified by the accident of *Luckmidass* having died before the institution of the suit. The true owners of this property are not *Luckmidass* or the Plaintiff, but the objects of the trust, the Sadhoos and the Sants, for whose benefit the fund is given. Such acknowledgment as there is operates not to the benefit of *Luckmidass* and his two co-executors alone, but for the persons whom they represented—that is to say, the charity at large.

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That, in their Lordships' opinion, disposes of the case; and the only importance of the subsequent transactions is to shew exactly how the dispute arises, because attempts have been made to appoint new trustees and to alter the management of the charity. On the 6th of November, 1873, another deed was executed between *Luckmidass* of the first part, certain widows entitled to maintenance of the second and third parts, and the Appellant of the fourth part. In the recitals of that deed there is no sort of dissatisfaction shewn with the arrangement that was made three and a half years before, but, on the contrary, there is a recital to this effect:—"Whereas there is now in the hands of the said *Luckmidass Damjee* certain promissory notes of the Government of *India* of a nominal value of rupees one lac thirty-nine thousand and five hundred, with the unexpended interest accrued thereon, as appears by the account relating thereto and kept by the said *Luckmidass Damjee*, being the amount set aside by the executors of the said *Runchordas Canjee* for the purchase, erection, and maintenance of a dhurumsala in *Bombay* for Sadhoos, as directed by the will of the said deceased." There is a distinct reference to the will of *Runchordass* as directing the maintenance of the dhurumsala, and a statement that there is now in the hands of *Luckmidass*, who appears to have assumed the sole management to the exclusion of his two co-executors, this sum of Rs.1,39,500. The operative part of the deed is mainly for the purpose of settling disputes which had arisen between the widows and the Appellant; but it also relates to the charitable trusts, and the first clause of it is to this effect:—"The said sum of Rs.1,39,500, together with the interest accrued due thereon as aforesaid, shall be set apart in trust for the benefit

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of the said Sadhoo dhurumsala, in compliance with the direction in that behalf contained in the said will of the said *Runchordass Canjee*, and shall be indorsed in the joint names of the said *Luckmidass Damjee*, *Purmanundass Jeevundass*, *Venayekrao Wassoo-deo*, *Khuttas Mucconjee*, and *Sunderdass Modjee*, who shall be the trustees of the charity, and that the said *Luckmidass Damjee* shall during his life be the sole managing trustee and keep the account of the said charity, and that after his death or resignation the said *Purmanundass Jeevundass* shall be the managing trustee, in like manner and with the like powers, but that the said promissory notes shall be kept in the custody of the said *Purmanundass Jeevundass*." Now nothing is clearer there than that the parties conceived that they were acting under the will, though they did more than the will authorized. The power to appoint new trustees had not arisen. Neither had they power to make any binding appointment of a sole manager. If indeed all they meant was. The trustees shall be responsible for the management, but we will agree that one shall do the work, then they would be making an arrangement *inter se* which is common enough among trustees ; but if they meant that which is now relied upon by the Appellant, if they were intending to constitute a wholly new basis for the trust, then they were departing from the provisions of the will, which they evidently intended to abide by.

There is one subsequent deed of the 9th of September, 1874, made between *Luckmidass* the Appellant, and the Respondent of the first part, *Bhanabhoy* of the second part, and the three parties of the first part, with *Khuttas Mucconjee* and *Sunderdass Modjee* of the third part. The object of that deed was to appoint five trustees of the charity. *Bhanabhoy* was then blind and desired to retire ; *Jairaz Champsey* was dead ; and the consequence was that the trust was not sufficiently manned. The appointing parties are the three remaining executors and the Appellant, who was recognised by the testator as entitled to act with the executors in the management of the trust. They assume that they have a power of appointment which under the terms of the will they really have not. But they still wish to act in accordance with the will, and in the recital which immediately precedes the witnessing part of the deed it is said that the parties of the first and

second parts, in execution of the power reserved to them in the will of *Runchordass Canjee* and of all other powers, have proposed to nominate and appoint two new persons to be trustees in the room and stead of *Jairaz*, who was dead, and *Bhanabhoy*, who was blind ; and they effect the appointment accordingly. Then they provide in a subsequent part of the deed that one trustee for the time being shall be the manager ; that *Luckmidass* shall be the first manager, and that when he ceases to be a trustee the Appellant shall be the manager. They may have thought that they had power to appoint one of their own body to be manager, taking the responsibility for the whole. It is not an unreasonable arrangement from the point of view of the trustees *inter se* ; but that they intended at this time to depart from the trusts of the will is conclusively negatived by the recital which has just been read. If they did intend it, their intention could not take effect.

That being so, it is difficult to see on what point the decree is wrong. Once establish the will and all the rest follows. It is quite right to constitute the trust fully ; and the Court has not gone beyond its proper discretion in appointing two new trustees. It is quite right that all the notes and securities shall be put in proper custody ; and that the Court has ordered.

With reference to the question of costs, it is suggested that an injury is done to the Appellant by the order that though the costs of the other parties shall be paid out of the charity fund, he shall be left to bear his own costs. On considering that matter, their Lordships do not see their way to alter the decree of the Court below. It would be departing from the general rule that the discretion of the Court below with respect to costs is not altered when there is no substantial alteration made in the decree itself. It is not a universal rule, but it is a general rule and a sound one. In this case their Lordships see no reason to depart from the rule. If the Appellant had on attaining age disputed the right of the testator to establish this charity, there would undoubtedly have been a suit instituted for the administration of the trusts of the will and the establishment of the charity by setting apart a proper portion of the testator's estate to answer it; and the costs would have fallen on the residue of the estate. By the arrangement made in 1870 the Appellant himself comes

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J. C. forward to assent to the appropriation of a proper sum to answer
 1882 the charitable trusts, and he takes all the residue clear of that liabi-
 — lity. He therefore has, by not disputing the will at that time, es-
 PURMA- caped the liability to costs which would certainly have fallen on
 NUNDASS the residue of the estate. Their Lordships entirely acquit the Appel-
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 v. lant of any covetous or sordid motives in this litigation. He has
 VENAYEK been willing to part with the money and to establish the charity
 RAO which his uncle desired ; but he has also desired to get that which
 WASSOODEO the will did not give him,—the entire control over it, and that is
 --- the cause of the dispute. Their Lordships think his own costs
 must now be borne by himself. He does escape the costs of the
 suit so far as the Plaintiff and the Advocate-General have incurred
 any, for those are to come out of the fund ; and their Lordships
 think that he has obtained quite sufficient advantage by the decree
 as it stands in respect to costs.

The result is, that their Lordships will humbly advise Her Majesty to dismiss the appeal ; and the Appellant must pay the costs of the appeal.

Solicitors for Appellant : *Hughes & Sons.*

Solicitors for Respondent : *Pollock & Co.*

R. Krishnamoorti
 ADVOCATE

RAO KARAN SINGH DEFENDANT ; J. C.*

AND

RAJA BAKAR ALI KHAN PLAINTIFF. 1882
April 26, 27

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Limitation—Act IX. of 1871, 2nd Sched. No. 145 (present article 144)—Adverse Possession—Possession by the Collector not adverse to the true Owner.

Although under the old law of limitation a Plaintiff must prove that he was in possession of the property in suit within twelve years before suit, yet under Act IX. of 1871 he may sue within twelve years from the time when the possession of the Defendant, or of some person through whom he claims, became adverse to him.

A Collector in possession of land for the purpose of protecting the Government revenue, is bound to pay the surplus proceeds of the estate to the real owner, and his possession does not become adverse to the real owner by reason of paying such proceeds to an adverse claimant.

• **APPEAL** from a decree of a Full Bench (Jan, 31, 1878) whereby a decree of a Divisional Court (April 17, 1876) was upheld, which affirmed a decree of the Judge of *Aligarh* (April 15, 1875) in favour of the Respondent, the Plaintiff.

The suit was brought on the 6th of June, 1874, against *Rao Kharag Singh, Rao Rudar Singh, and Rao Karan Singh*, the above-named Appellant, to recover principal and interest due on two registered mortgage bonds, dated respectively the 7th of January, 1862, and the 6th of October, 1862, executed by *Baharjit Singh*, as father and guardian of the said *Kharag Singh* and *Rudar Singh*, then minors; and also to recover the amount claimed by sale of mouzah *Khurd Khera*, pergunnah *Koil*, hypothecated by the said bonds, of which property the Appellant, *Rao Karan Singh*, claimed to be in possession.

The defence, so far as concerns the sole Appellant *Rao Karan Singh*, was that he had been in adverse possession of the property for more than twelve years before the commencement of the suit, so that the claim of the Respondent was barred by the limitation

**Present* :—SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

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in article 145 of Act IX. of 1871. The Appellant further contended that the consideration for the bonds never passed, and that the bonds were not executed in good faith by *Baharjit Singh* for the benefit of the minors.

The three Courts mentioned above, held that the Defendant, the above Appellant, had failed to prove an adverse possession of the property for the twelve years aforesaid ; that the consideration for the bonds had duly passed, and that the bonds were executed in good faith and for the benefit of the minors.

The concurrent findings in favour of the Respondent upon the two latter questions, being findings of fact, the question in appeal arose out of the plea of limitation.

The facts are stated in the judgment of their Lordships.

C. W. Arathoon, for the Appellant, contended that by a general principle of law the Plaintiff could not recover unless he shewed a possession within twelve years from date of suit. [SIR BARNES PEACOCK :—General principle does not prevent a Plaintiff from recovering possession of his property at any time. You must shew the limitation clause on which you rely.] See Act IX. of 1871, 2nd sched. No. 145.

Leith, Q. C., and *Witt*, for the Respondent, were not called upon.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK :—

This is a suit brought to recover a sum of Rs.13,745 on two bonds, one dated the 7th of January, 1862, for Rs.4,000, and the other dated the 6th of October, 1862, for Rs. 1,000. Those bonds were executed by *Baharjit Singh*, the father of *Kharag Singh* and *Rudar Singh*, who were infants, for money advanced by the Plaintiff to enable them to defend certain suits brought by *Karan Singh*. It appears that *Badam Singh* was entitled to certain property, and that upon his death his widow took possession. *Karan Singh*, who is now the Appellant, brought a suit to turn the widow out of possession upon the ground that *Badam Singh* had made him his heir-at-law. That suit was defended by the

widow, who died during the pendency of it; and the grandchildren *Kharag* and *Rudar Singh* were made parties to the suit, *Baharjit* their father acting as their guardian. The suit was determined in favour of the Defendants. After the death of the widow, *Karan Singh* claimed the property on behalf of his grandfather *Gholab Singh*, on the ground that the infants, who were sons of a daughter, were not, according to a custom of the family, entitled to inherit the estate. The father of the infants borrowed the moneys for the purpose of defending the suits, and it is now admitted that no question can be raised as to the validity of the bonds, the father having been justified under the circumstances in borrowing the money, and the Plaintiff in lending it, for the benefit of the infants. The bonds are both in the same terms:—
 "I therefore covenant in writing that I shall pay the above-mentioned amount in full, with interest at one rupee per cent. per mensem, on demand, without raising any objection or pretext; that until the payment of the amount of this bond, the share in mouzah *Khurd Khera*, pergunnah *Barouli* (which is already hypothecated in satisfaction of the former loan), shall remain pledged and hypothecated in satisfaction of this loan also; and that I shall not alienate it elsewhere by means of mortgage sale." That is what is usually called a mortgage bond. The Plaintiff claimed to enforce payment of the money due under the bonds by sale of mouzah *Khurd Khera*, the estate which was hypothecated. The only question now remaining, the bond having been held to be a valid bond, is whether the Plaintiff in the suit is barred by limitation.

The second suit against the infants was referred to arbitration, under which, by an award dated the 5th of August, 1863, the village *Khurd Khera*, which was sought to be sold by auction, together with other villages and properties belonging to *Badam Singh*, were declared rightfully to belong to *Golab Singh*, the Defendant's grandfather, and not to *Kharag Singh* and *Rudar Singh*. The Defendant *Karan Singh*, as guardian of *Golab*, sued on the said award, and obtained a decree from the Principal Sudder Ameen's Court on the 31st of August, 1863, in execution of which he was put into possession in October of the same year.

Pending the disputes between *Karan Singh* and the infants,

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the Collector, in order to secure the Government revenue, attached and took possession of the property, and retained possession from 1861 until October, 1863, when, in consequence of the decree of the Principal Sudder Ameen, he delivered possession to the Defendant and paid over to him the surplus profits of the estate after deducting the Government revenue and expenses. The present suit was brought in the year 1874; and at that time twelve years had not elapsed from the time when the Defendant obtained possession from the Collector. It was contended that the Plaintiff must prove that he was in possession within the period of twelve years; but when their Lordships come to consider the present law of limitations, they find that that is not correct. It would have been correct under the old law, under which the suit must have been brought within twelve years from the time of the cause of action; but under the present law it may be brought within twelve years from the time when the possession of the Defendant, or of some person through whom he claims, became adverse to the Plaintiff. His possession since 1863 was not twelve years' possession; but it is contended that he was justified in adding or tacking to his possession the possession of the Collector from 1861. Their Lordships must assume that the Collector properly took possession for the purpose of protecting the Government revenue. It was the duty of the Collector, whilst in possession under the attachment, to collect the rents from the ryots, and having paid the Government revenue and the expenses of collection, to pay over the surplus to the real owner. If the Defendant was the real owner the surplus belonged to him; but if, on the other hand, the infants were the right owners, then the surplus belonged to them. The Plaintiff was not bound by the decision of the arbitrators, for his bonds were prior to the submission to arbitration. The Collector, by paying over the money to *Karan Singh*, did not give *Karan Singh* a title.

It appears now, as between the Plaintiff and the Defendant, that the infants were entitled to the property, because no evidence whatever has been given to shew that the custom of the family set up by the Defendant, namely, that the son of a daughter could not inherit, ever existed. According to the ordinary Hindu law the infants were entitled to inherit. Therefore, although the

Collector gave up possession of the estate and paid over the surplus proceeds to *Karan Singh*, that did not shew that he was holding for *Karan Singh*. The Defendant does not claim through the Collector, and he cannot add to his possession from the year 1863 the possession of the Collector from 1861 to 1863.

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Under these circumstances their Lordships think that the majority of the Judges of the High Court came to a correct conclusion that this suit was not barred by limitation, and consequently that the Plaintiff is entitled to recover.

Their Lordships will therefore humbly advise Her Majesty to dismiss the appeal, and to affirm the decision of the High Court. The Appellant must pay the costs of the appeal.

Solicitor for Appellant : *T. L. Wilson*.

Solicitors for Respondent : *Pritchard & Sons*.

J. C.* RAJAH NILMONI SINGH (DEFENDANT) . APPELLANT ;

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SECRETARY OF STATE FOR INDIA } RESPONDENTS.
(DEFENDANT)

ON APPEAL FROM THE HIGH COURT AT CALCUTTA.

Ghatwali Tenures—Reg. XXIX. of 1814—Mode of Descent—Assets by Descent in the Hands of a Son.

The lands in suit being lands the tenure of which is analogous to a ghatwali tenure of the nature described in preamble to Reg. XXIX. of 1814, had been held by the Plaintiff's father during his lifetime, and had at his death descended to the Plaintiff as his son and heir, the Plaintiff having been moreover appointed thereto by the Government.

Held, that they were not liable to be seized in execution of a decree against the father as assets by descent in the hands of the Plaintiff, his son.

Such tenures are not resumable by the zemindar or by the Government. They are not transferable, nor saleable in execution of a decree, nor divisible. Though hereditary they are not governed by the ordinary rules of inheritance, under the Hindu or Mahomedan law, and are subject to the condition of the Government's approval of the heir.

Rajah Lelanund Singh v. Government of Bengal (1) approved.

APPEAL from a decree of the High Court (June 9, 1879), setting aside under the 15th section of its letters patent a decree of the High Court dated April 21, 1877, and restoring a decree of the Judge of *Burdwan* (May 25, 1875), which set aside an execution sale of the lands in suit dated August 10, 1874, to the Appellant, and confirmed the Respondent *Bukranath Singh* in possession.

The object of the suit, which was brought on the 11th of September, 1874, was to get rid of the effect of a sale to the Appellant in execution of a decree which he had obtained against the

**Present* :—LORD BLACKBURN, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

Plaintiff, *Bakranath Singh's* father, of a jaghire tenure which had been held by the father in his lifetime and after his death by *Bakranath Singh*, and to have *Bakranath Singh* maintained in possession of the said jaghire as against the Appellant, the Rajah of *Pachete*. The Plaintiff's contention was that the Government was the proprietor of the tenure, and that the Plaintiff held it, not as heir to his father but as appointee of the Government, on condition of performing police service, and that it could not therefore be sold in execution of a decree obtained against the last holder.

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The Government supported the Plaintiff's claim on the ground that as previous decisions had established that the jaghire in suit was held "as police service lands in lieu of wages, subject to the discharge by the jaghiredar of police duties," and as the Appellant had caused them to be sold "without any specification that they were service lands," he could acquire no title by the purchase. In appeal the Government admitted that the tenure was hereditary in the absence of some special objection to the person entitled to succeed.

The Appellant contended by his written statement (*inter alia*) that the lands in suit were part of his zemindary held at variable rents and subject to the obligation of rendering certain services to the zemindar, and that the interest of the Plaintiff was liable to sale in execution and in satisfaction of the debts of his father, and had been so sold.

The proceedings in the suit and the issues are set out in the Judgment of their Lordships.

The question decided was whether the land in suit was liable to be seized in execution of a decree against the father as assets by descent in the hands of the Plaintiff, his son.

The Judge decreed that the execution sale be annulled, and declared the Plaintiff's right to continue in occupation of the land in suit as the service-tenant of Government and as the rent-paying tenant of the Appellant, the Rajah of *Pachete*.

The High Court (*Markby* and *Mitter*, JJ.), in accordance with the opinion of the Senior Judge (*Mitter*, J., dissenting), reversed this decision and dismissed the suit.

In appeal under the 15th clause of the letters patent, the High Court (*L. S. Jackson*, C.J., *Ainslie* and *White*, JJ.) reversed the

J. C. decision of *Markby*, J., and confirmed the decree of the First
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The material part of the judgment of *L. S. Jackson*, C.J., was as follows :—

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“The Rajah it appears brought a suit against the father to recover possession of some lands quite unconnected with the jaghire. He got a decree for possession, and costs amounting to Rs. 72, and it was in execution for these costs that the proceedings took place which have given rise to the present suit.

“The decree being against *Beer Sing*, and *Beer Sing* having died before execution fully had, sect. 210 Act VIII. of 1859 authorized application to execute against his legal representative, and such execution would be permitted in the manner prescribed by sect. 203. That section permitted attachment and sale of ‘property of the deceased person,’ and it seems to me that the principal question which we have to consider is, whether mouzahs *Dhekia* and others were property of the deceased, which had come into the Plaintiff’s possession. The jaghire in question was not enjoyed by *Beer Sing* without conditions, nor was it a simple inheritance. The holder of it was bound to perform certain duties of a public nature. Mr. Justice *Markby* observes that the character of these services was ‘exceedingly indefinite,’ but that is precisely what might have been expected. It was not the practice of the country and of those times to define exactly the nature of services to be rendered in consideration of a grant. Both parties, grantor and grantee, designedly left it vague and elastic. The grantor trusted that superior power would make the conditions capable of extension in any direction required, and the grantee relied on the indolence or negligence of his superior to make the compliance with these conditions in general easy. The vagueness of the service required, therefore, is not to be taken as denoting insignificance.

“The duties, then, were to be performed, and performed as the condition of holding the jaghire, which the Government had endowed by setting aside a third of the profits of the land, and no one could perform the duties unless he were appointed or approved.

“Mr. Justice *Markby* admits that he did not perform them as

appointee of the zemindar, and it seems to me impossible to escape the conclusion at which Mr. Justice *Mitter* has arrived, namely, that the ultimate right of appointment, as of dismissal, rested with the Government. In connection with this part of the subject, as we seem to be in some danger of neglecting or forgetting the ancient law of the country, I think it well to fortify myself by the authority of the eminent author of the 'Analysis of Regulations,' Mr. *J. H. Harrington*.

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"In the judgment of the Division Bench, on which Mr. Justice *Markby* relies, I find the following passage, which I assume to be in accordance with the evidence in the case:—'On examining the figures given in this statement, it appears that no difference whatever was made between what are called jaghire villages and the other villages of the estate, while no right is claimed for the Government, except the right to exact a certain share of the produce as land revenue.' The conclusion therefore seems unavoidable, that Government, after the decennial settlement, retained no interest in the land except the right to receive rents from it as from all other lands not specially exempted. The fact that the Government officers encroached upon the rights of the rajahs by habitually treating these lands as if they belonged to the class of digwari jaghires, is no more evidence of their right than is the document set out by the Respondent proof that the Government officers had a right to compel the jaghiredars of mouzah *Dhekia* to furnish rations for their camp, though apparently they did so.

"In the present case Mr. Justice *Romesh Chunder Mitter* gives it as the result of an examination of the settlement record, that the Government had set aside, as the jaghiredars' emolument, one-third of the assets, which, accordingly, were not included in the jumma, which was the basis of settlement with the zemindar.

"Now let us turn to Mr. *Harrington* (3 Anal 509). After mentioning Reg. XXIX. of 1814 he goes on:—'Tenures of this description were mentioned generally in a note to the 2nd volume of this analysis, as held at a low rent by ghatwals or guards of passes. They exist to a considerable extent in all the hilly districts on the western frontier of *Bengal*, and appear for the most part to have originated in assignment of lands for the protection

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of the ghats and villages near the hills. There is, however, a material difference in the tenures of ghatwals. Those of *Surhut* and *Deogur*, in the district of *Birbhoom*, to whom the provisions of Reg. XXIX. of 1814 immediately relate, have a defined and permanent interest in the lands which compose their respective mehals, and which consist of entire villages or more extensive tracts of lands : whereas the sirdar and inferior ghatwals in the contiguous zemindary of *Bishenpore* have small and specific portions of land in different villages assigned for the maintenance of themselves and of the paiks and chowkidars acting under them, of a nature analogous to the chakran assignments of land to village watchmen in other districts. The ghatwali tenure, however, as ascertained from the result of inquiries made by the magistrate of zillahs *Burdwan*, *Birbhoom*, and the jungle mehals, and communicated to the Court of Nizamut Adawlut in the year 1816, differs essentially from the common chakran in two respects, first that being expressly granted for purposes of police at a low assessment, which has been allowed for in adjusting the revenue payable by the landholders to Government at the formation of the permanent settlement, the land is not liable to resumption nor the assessment to be raised beyond the established rate at the discretion of the landholders ; secondly, that although the grant is not expressly hereditary, and the ghatwal is removable from his office and the lands attached to it for misconduct, it is the general usage on the death of a ghatwal who has faithfully executed the trust committed to him to appoint his son, if competent, or some other fit person in his family to succeed to the office.'

"He proceeds:—'The above discrimination between the ghatwali tenure, which being an appropriation of land at a low jumma for a police establishment, may be considered within the 4th clause of sect. 3, Reg. I of 1793, and the common chakran assignments in lieu of wages to zemindary servants which have been annexed to the malgoozari lands, and declared responsible for the public assessment by sect. 41, Reg. VIII. of 1793, is taken verbatim from a letter written by order of the Nizamut Adawlut to the *Calcutta* Court of Circuit on the 30th of October, 1816. It is probable that some specific provisions may hereafter be enacted for defining more exactly the rights of the ghatwals referred to.

At present, however, those of zillah *Birbhoom* only are included in the enactments of Reg. XXIX. of 1814.'

"The terms of Reg. I. of 1793, sect. 8, clause 4, are as follows:—

"The jumma of those zemindars, independent talookdars and other actual proprietors of land which is declared fixed in the foregoing articles, is to be considered entirely unconnected with and exclusive of any allowances which have been made to them in the adjustment of their jumma for keeping up thannahs or police establishments, and also of the produce of any lands which they may have been permitted to appropriate for the same purpose; and the Governor in Council reserves to himself the option of resuming the whole or part of such allowances or produce of such lands according as he may think proper, in consequence of his having exonerated the proprietors of land from the charge of keeping the peace, and appointed officers on the part of the Government to superintend the police of the country. The Governor-General in Council, however, declares that the allowances or produce of lands which may be resumed will be appropriated to no other purpose but that of defraying the expense of the police, and that instructions will be sent to the Collectors not to add such allowances or the produce of such lands to the jumma of the proprietors of land, but to collect the amount from them separately.'

"It seems to me, as it evidently did to Mr. *Harrington*, that the reservation is one that would be within the meaning of this clause; and, therefore, it clearly cannot be said in this case that the Government had no interest reserved, although it had bound itself to hold the reserved allowance applicable to certain purposes only, and it seems to follow most plainly that the reserved one-third is held by the jaghiredar directly from the Government, as it froms no part of the zemindar's jumma.

"But, as I have already said, it appears to me needless, for the purpose of the present appeal, to determine with whom the appointment lay. What is material is this, that the incoming jaghiredar took the land subject to either appointment or approval, and with an attached burthen of public duty. These two restrictions appear to me conclusively to shew that the Plaintiff did not hold these mouzahs as 'property of the deceased judg-

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ment debtor which had come into his possession,' but that he held them as a quasi public servant on precisely the same tenure as his father had held them, and that the father's interest was strictly limited to his own life and performance of the functions. However slight the restrictions on succession, and in whosoever hands they rested, they appear to me sufficient to deprive the jaghire of the character of simply heritable property."

Doyne, for the Appellant, contended that the Appellant had a right to have the lands sold in execution of his decree against the Plaintiff's father. They were included in his permanently settled zemindary of *Pachete*. The services, which were private services, as well as the rent belonged to him. The Plaintiff's tenure had been admitted to be hereditary, and to have come to him by descent from his father, the judgment-debtor. The Respondents have not shewn that at the decennial or permanent settlements the Government retained any right of dispossession over this tenure, or of interference with its hereditary descent, or with the ordinary rights of the zemindars. Nor have they given sufficient evidence to prove that the Government had acquired or exercised any legal right to require police services from the holders of the tenure. Such right, if it existed, would not necessarily take away from the tenure its liability for the debts of the last holder.

The jaghiredars, to which class of tenants the Plaintiff claimed to belong, were one of the quasi-military classes, holding portions of the lands of *Pachete*, who were liable to be called on to repel invasion, arrest thieves, and maintain order. They differ entirely from the class called digwars, who were rent-free tenants, appointed by and subject to the magistrates and free of all obligations to the zemindar. The jaghiredars, as alleged by the Respondents, paid to the zemindar or to the Government prior to the permanent settlement two-thirds of the profits or fair rental of their lands, and retained for themselves the other third. They were liable to be called upon for aid by the digwars, at the Rajah's cost.

In 1771 it appears that Mr. *Higginson*, who was civil and military "supervisor" of the district prior to the permanent

settlement of *Pachete* in 1789, gave to the jaghiredars leases at two-thirds of the ordinary rental. None of these leases have been produced. It does not appear whether the remission of one-third rent was in consideration of ancient tenure or of services. It does not appear whether the settlement of the *Pachete* zemindary was village by village, or in lump for the whole estate. It however included the Plaintiff's jaghire. But it was presumed against the Appellant that the Government retained at the time of the settlement in respect of the one-third rent remitted a right to police services from the jaghiredar and a right to dismiss and appoint him. There is no foundation for such assumption, and no evidence given in support of such a contention. With regard to the history of this raj and of the dealings of the Government with it, and with regard to the rights of landholders, reference was made to the 5th report of the Select Committee, p. 395 ; Reg. I. of 1793, sects. 2, 8 ; *Harrington's Analysis*, vol. iii, p. 237. The fact that the police responsibility was taken away from the zemindars in 1792 shews that prior thereto it rested upon them. The police jaghiredars were then their subordinates, but in 1792 were discharged from police duties. The relationship, however, remained to their own local chief. Reference was made to *Raja Lelanund Singh v. Government of Bengal* (1); Reg. VIII. of 1793, sects. 36, 41, 67, sub-s. 4 ; Reg. XXII. of 1793, preamble and section 1 ; *Harrington's Analysis*, vol. iii, pp. 239, 241 ; Reg. VIII. of 1814, XX. of 1817. The Government have no right with regard to lands of the nature of these jaghires. A present was made to the zemindar of the one-third rent. Reference was then made to *Rajah Lelanund Sing Bahadoor v. Thakoor Munoorunjun Singh* (2); *Joykishen Mookerjee v. Collector of East Burdwan* (3), with regard to the incidents of a tenure where there were services of a public character : *Rajah Nilmoni Singh v. Bakranath Singh* (4); *Binode Ram Sein v. Deputy Commissioner of the Sonthal Districts* (5). Nothing has been shewn to have occurred to render inalienable a tenure which is admittedly hereditary, and which in its earlier history was alienable. Its position before the decennial settle-

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(1) 6 Moore's Ind. Ap. Ca. 101.

(3) 10 Moore's Ind. Ap. Ca. 16.

(2) Law Rep. Supp. Vol. p. 181.

(4) 10 Suth. W. R. 255.

(5) 7 Suth. W. R. 178.

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ment was that it was granted out of this zemindary by a predecessor of the Rajah in consideration of public services to the zemindar. The jaghiredar was not a servant of the State but of the zemindar; and at the permanent settlement this was recognised; and it rests upon the other side to shew that the Government was entitled to the services claimed. As to its hereditary tenure rendering it alienable, see Reg. XXXVII. of 1793, sect. 15, and a decision thereon: *Bithul Butt v. Lalla Raj Kishore* (1).

Graham, Q.C., and Woodroffe, for the Respondents, contended that the execution sale did not pass any title to the lands in suit to the Appellant. Neither the lands nor *Bakranath's* tenure thereof, whilst in his possession as jaghiredar under the Government, was liable to be sold in execution of a decree against his deceased father. The tenure was a public service tenure, Government and not the Appellant being entitled to the services. No one could in law acquire any right or title to the lands in suit so as to oust *Bakranath*, unless upon a valid appointment or approval of such person by Government as jaghiredar thereof instead of the Respondent. Originally this zemindary was in *Birbhoom*, and governed by regulations applicable to *Birbhoom*; being transferred from the jurisdiction of the magistrate thereof by Reg. XVIII. of 1805. This tenure is one of the semi-military tenures analogous to if not identical with those described as ghatwali in Reg. XXIX. of 1814. Their origin is to be found in a compact between the sovereign power and the grantee, but when that took place is not clear except that these tenures did not owe their existence to any of the Rajahs of *Pachete*, but date back to a time antecedent to the grant of the dewanny in 1765. It was in 1771 that these tenures were brought under British rule. The jaghiredars then received their leases from the supervisor of *Birbhoom* at a jumma equivalent to two-thirds of their malgoozari, the remaining third being retained by them as remuneration for the services which were the condition of their tenure. The permanent settlement could not alter the nature of the tenure. Nor did any of the Regulations confer upon it an alienable character, or render it resumable by either the Government

or the zemindar. Reference was made to *Harrington's Analysis*, vol. iii, p. 413; *Rajah Nilmoni Singh v. Government and Others* (1); *Binode Ram Sein v. Deputy Commissioner of the Sonthal Districts* (2); *Rajah Nilmoni Singh v. Bakranath Singh* (3); *Hurlal Sing v. Jorawun Singh* (4); *Rajah Lelanund Singh v. Government of Bengal* (5); *Kooldeep Narain Singh v. The Government* (6); Reg. I. of 1793, preamble; Reg. XXXVII. of 1793; Reg. II. of 1819; *Sartukchunder Dey v. Bhagut Bharutchundir Singh* (7); *Forbes v. Meer Mahomed Tuquee* (8). With regard to the admission made as to the hereditary character of this tenure, that goes no further than what is described in *Harrington's Analysis*, vol. iii, p. 509, in commenting on the *Birbhoom* ghatwals. It means that it is usual to appoint the son unless there is something to disqualify him.

Doyne replied.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

This is an appeal from a decree of the High Court at *Calcutta*. The Appellant is *Rajah Nilmoni Sing*, the rajah and zemindar of *Pachete*. He was the Defendant in the suit out of which the appeal arises, and which was brought against him by the Respondent, *Bakranath Sing*, for confirmation of possession of a jaghire mehal, consisting of mouzah *Dhekia* and other mouzahs specified in the schedule to the plaint, by establishing his title to the same and reversing a summary order of the 10th of August, 1874.

It appears that the Appellant, having obtained a decree against *Beer Sing*, the father of the Respondent, for the sum of Rs. 72 odd, awarded to him for costs, had caused the mouzahs in question to be attached in execution of the decree, and that on the 11th of June, 1874, a Proclamation was issued for the sale of the right, title, and interest of the judgment-debtor therein on the 10th of August in that year. In the Proclamation the Plaintiff was

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(1) 6 Suth. W. R. 121.

(2) 7 Suth. W. R. 178.

(3) 10 Suth. W. R. 255.

(4) 6 Sel. Rep. 169.

(5) 6 Moore's Ind. Ap. Ca. 101.

(6) 14 Moore's Ind. Ap. Ca. 247.

(7) S. D. A. (1853), p. 900.

(8) 13 Moore's Ind. Ap. Ca. 438.

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described erroneously as the judgment-debtor, whereas he was only the heir-at-law against whom the decree had been revived after the death of his father, *Beer Sing*.

On the day appointed for the sale, the Respondent presented a petition stating that he was not in possession of any property of the deceased judgment-debtor, and that the Government jaghire mehal could not be sold on account of the debts of the deceased; that since the death of his father, the late *Beer Sing*, he had been appointed jaghiredar, and was in possession of the mouzahs attached as ghatwal appointed on the part of Government; that the decree-holder, without describing the mouzahs to be jaghire, and without stating the nature of his father's interest therein, had secretly done the acts relating to the execution of his decree; and that the Petitioner, having received information that the jaghire mehals would be sold on the 10th of August, had presented the petition stating his objections. Upon that petition the summary order referred to in the plaint was passed by the Moonsiff:—"This petition of claim has been filed to-day just before the sale; the claim cannot be allowed at such a time. It is ordered that the petition of claim be rejected." The sale accordingly took place, and the present Appellant became the purchaser.

The suit out of which this appeal arises was originally instituted in the Court of the Moonsiff of *Chowki Gungajalghati*, in the district of *West Burdwan*, and the Secretary of State for *India* was made a *pro forma* defendant. The suit was subsequently removed into the Court of the Judge of *West Burdwan*.

The Government put in a written statement, in which they alleged that the lands were police-service lands, and that they had been held by jaghiredars in lieu of wages for the performance of police duties from before the permanent settlement, as had been formerly determined in the presence of the Rajah Defendant by the Deputy Commissioner of *Manbhoom*, in case No. 105 of 1863, and the several Courts of Appeal; that the lands not being transferable, and the Rajah Defendant having caused them to be sold without any specification that they were service lands, and having himself purchased them at the sale, could acquire no title by the purchase.

The Rajah Defendant, in his written statement, contended,

amongst other things, that the mouzahs were not a jaghire constituting Government property, but part of his permanently settled *mal* estates, and that they had been granted by his father to the Plaintiff's father as a service tenure.

Further, he made the following statement:—

“ Third. ‘ Turruf *Dhekia*,’ in which these mouzahs are comprised, was divided into two (equal) parts, one of which is Plaintiff's ancestral property, and the other was enjoyed by *Dhurmo Das Chuckerbutty* as a service tenure in the manner described above. Subsequently, the half share of turruf *Dhekia*, held by the said *Dhurmo Das*, having been sold by auction for arrears of rent, his grandson, *Udoy Chuckerbutty*, brought a Civil suit to set aside the sale, alleging the share to be Government jagir property ; but, in the judgment of the High Court, the suit was dismissed, on declaration that the disputed estates appertained to the *mal* land, and in rejection of the allegation as to the Government jagir lien, as will appear from the decision. Therefore the Plaintiff's suit is evidently false.

The Plaintiff himself was examined, and stated that his profession was that of a ghatwali jaghiredari that he was jaghiredar of ghat *Dhekia*, that he was appointed in 1273 by the magistrate of *Bancoora*, and served the Government and carried out the orders issued by the thannah ; that the jaghire lands did not remain in his possession unless he performed the service ; that the person who is appointed in the place of a dismissed ghatwal holds possession of the land ; that after his appointment the sub-inspector put him into possession : and that he never did any service for the Rajah, and did not receive any permission from the Rajah on his appointment.

Amongst other issues, the following were raised :—

2nd. Whether the status or condition of the lands as Government service, *i.e.*, ghatwali or jaghire, had been decided in a former suit by a Court of competent jurisdiction.

3rd. Whether the land in suit was held by the Plaintiff as service land, *i.e.* ghatwali or jaghire under Government, or as service land under the Defendant, Rajah *Nilmoni Sing*.

4th. Whether the land was land on account of which rent was

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paid to the Rajah by the Rajah's appointee, and whether this rendered the tenure a saleable one.

5th. Whether the plaintiff's interest in the land was such an interest as admitted of being brought to sale in satisfaction of a decree due from the Plaintiff's predecessor to the Rajah.

The case was tried by the Officiating Judge of *West Burdwan*. On the trial the Government accepted the full burthen of the suit, and supported the Plaintiff. It still holds the same position, having been made a Respondent, and having appeared by counsel before their Lordships and opposed the appeal.

The only substantial question to be decided is, whether the mouzahs in question, which had been held by the Plaintiff's father during his lifetime, and which at his death descended to the Plaintiff, as his heir, and to which the Plaintiff was appointed by Government, were liable to be seized in execution of a decree against the father as assets by descent in the hands of the Plaintiff, his son.

Neither the origin of the jaghire nor the precise time at which it was created is known, but it appears that as far back as 1771, corresponding with 1178 B.S., the villages of which it was composed were held by jaghiredars who paid to Government two-thirds of the annual value thereof as revenue, and retained the other one-third as remuneration for the services under which the jaghire was held. The villages included in the jaghire were permanently settled as part of the zemindary of *Pachete*, of which the Defendant Appellant is the zemindar. In fixing the Government revenue at the time of the decennial settlement, the lands included in the jaghire were assessed at the two-thirds then payable by the jaghiredar to the Government, and the one-third retained by the jaghiredar in lieu of services formed no part of the assets of the zemindary in respect of which the Government revenue was fixed.

Jaghiredars were successively appointed or approved by Government up to the time of *Gooroo Churn Mookerjee*, who was appointed in 1816 in the place of *Roop Sing*, who was dismissed for misconduct.

In February, 1817, *Gooroo Churn* petitioned the magistrate for leave to associate *Dhurmo Doss Chuckerbutty* with himself as head-

man ; this was sanctioned, and they divided the jaghire and the duties. On the death of *Gooroo Churn*, his son applied to be installed as his successor, but *Roop Sing* having applied to be reinstated, his application was granted. In 1834 *Roop Sing* attempted to oust *Dhurmo Doss Chuckerbutty*, but this was not allowed, and the jaghire has ever since remained divided.

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It was contended, on behalf of the Appellant, that, as the lands were included in his permanently settled zemindary, the services as well as the rent belonged to him ; that the services were private services, and that he had a right to cause the lands to be sold in execution of his decree.

In support of his case, the decision of the High Court referred to in the Rajah's written statement was cited. It is set out in the appendix to the record, and was in a suit brought against the Rajah by *Udoy Chuckerbutty*, who had been appointed successor of *Dhurmo Doss Chuckerbutty*, to obtain possession of the mouzahs which constituted that portion of the jaghire which upon the division of it had been allotted to *Dhurmo Doss*, whose right and interest had been sold by the Rajah in execution of a decree for rent obtained by the Rajah against him. The Government was a party to that suit, and supported the claim of the Plaintiff therein. The first Court held that the Plaintiff had a right to recover possession of the jaghire lands, but that decision was reversed on appeal by the High Court. In speaking of that case, the officiating Judge in the present case remarked :—" It is not relevant as evidence in this case, but is useful as a precedent or in argument. The Court found in that case that the services exacted by Government were encroachments on the Rajah's rights, and that the duties, *i.e.*, service, attached to the holding of the land, and not the holding of the land to the appointment to perform the duties. With respect to the lands in dispute, I have to remark that the Rajah's evidence in this case, as well as that of the Government, shews that the opposite is true in this case." Then, after referring to the evidence, he says :—" I therefore conclude that the performance of the services is the chief title to the jaghire lands, and that no man has any right to hold these lands except on a title arising out of a valid appointment to discharge the services ; to adapt the words of the High Court's judgment," or rather the converse of it,

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"to the facts of the case, 'the holding of the lands attaches to the duties, and not the performance of the duties to the holding of the land'." On the third issue he found that the land in suit was land held by the Plaintiff, *Bakranath Sing*, as service under Government, *i.e.*, not ghatwali but jaghire land, and was not held as service under the Rajah. On the 4th issue he found that the land in suit was not land on account of which rent was paid to the Rajah by the Rajah's appointees; and on the 5th that the Plaintiff's interest in the lands was not such as admitted of its being brought absolutely and without special conditions to sale in satisfaction of a decree due from the Plaintiff, or his predecessor, to the Rajah, but that the interest was saleable for the purpose aforesaid, provided it be sold subject to the performance of the jaghire services by the purchaser, after he has obtained appointment to the duties at the hands of the magistrate or his representative police authorities, and installation by the same authorities. He accordingly annulled the sale of the lands under the execution; set aside the summary order of the Moonsiff, and declared that the Plaintiff had a right to continue in possession as the service tenant of the Government, and as the rent-paying tenant to the Plaintiff. The case was appealed to the High Court. The appeal was heard by a Division Bench, consisting of Mr. Justice *Markby* and Mr. Justice *Romesh Chunder Mitter*, who differed in opinion. The decree of the officiating Judge was reversed, and the suit dismissed, in accordance with the opinion of the senior Judge, Mr. Justice *Markby*, Mr. Justice *Romesh Cunder Mitter* dissenting, and holding that the decree ought to be affirmed.

Mr. Justice *Markby* agreed with the officiating Judge that the Rajah had not shewn that the Plaintiff held as his appointee; he relied upon the fact that the lands were part of the revenue-paying lands of the Rajah, and also upon an admission of the Advocate General, on behalf of the Government, that the tenure was an hereditary one, unless there was some special objection to the person entitled to succeed. He also relied very strongly upon the decision in *Udoy Chund Chuckerbutty's* case, already referred to, and added, "An appeal against this decision was lodged in the Privy Council by the Government, but it has not been prosecuted; and it is admitted that there is no intention to prosecute it." He

stated that he thought it was his plain duty to follow the former decision, unless he had the clearest possible reasons for differing from it ; and that so far from differing from the decision, having considered the evidence and heard the arguments, he entirely concurred in it. He then proceeded to discuss the question whether the fact that the holders of the lands were liable to perform some services of an exceedingly indefinite character, but something of a police kind, to Government took away from this tenure the character of alienability, which it would otherwise possess, and expressed his opinion that it did not.

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An appeal was preferred under sect. 15 of the letters patent of the High Court from the decree of the Division Bench to the High Court, and was heard by Mr. *Louis S. Jackson*, then officiating Chief Justice, Mr. Justice *Ainslie*, and Mr. Justice *Sewell White*, when the decree of the Division Bench was reversed, and the decree of the first Court affirmed by a majority, consisting of the acting Chief Justice and Mr. Justice *Sewell White*, against the opinion of Mr. Justice *Ainslie*. Their Lordships concur generally in the view taken by Mr. Justice *Romesh Chunder Mitter* and the acting Chief Justice, and are of opinion that the decree now under appeal ought to be affirmed. The judgment of Mr. Justice *White* was founded merely upon the form of the Proclamation ; he concurred with the first Court in holding that as the Proclamation did not describe the lands as held under a service tenure, the sale to the Rajah, under the execution, passed no title to the property, and he abstained from expressing an opinion upon the question as to which Mr. Justice *Markby* and Mr. Justice *Romesh Chunder Mitter* differed, viz., whether the interest of the Plaintiff's deceased father in the lands was such that when they came into the possession of the Plaintiff they were assets of the father, and as such liable to be attached and sold for his debts.

According to the report of *Lala Kanji*, tehsildar of *Pachete*, made on the 18th of July, 1799, it appears that there were in *Chakla Pachete*, in addition to the digwars, three other classes of guards whom he describes as jaghiredars, ghatwals, and chowkidars. He says of the first, they hold their mouzahs in jaghire, and whenever the digwars require assistance in arresting thieves or rioters, the jaghiredars assist them with their men. Of the second, that is

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the ghatwals, he says the second were posted at the ghats, thirty-six in number. In twenty-three of these the ghatwals were subordinate to the digwars, and were paid by them out of their jaghires; thirteen are occupied by the Rajah's own immediate servants paid by him.

It is clear that the jaghiredar in question was not one of the ghatwals referred to in the report as being subordinate to and paid by the digwars out of their jaghires, for they were paid by the one-third of the malgoozari, which they were allowed to retain as a compensation for their services.

Mr. Justice *Romesh Chunder Mitter* held that the tenure in question was analogous to a ghatwali tenure, Mr. Justice *Ainslie* treated it as one of the ghatwalis to the south of *Birbhoom*. Their Lordships entertain no doubt that whether it was a ghatwali or not the tenure was analogous to a ghatwali tenure of the nature described in the preamble to Reg. XXIX of 1814; and the Acting Chief Justice appears to have entertained the same view, by referring to Mr. *Harrington's* Analysis of the Regulations, vol. iii., 509, where, after mentioning Reg. XXIX. of 1814, he goes on to say, tenures of this description were mentioned generally in a note to the 2nd volume of this Analysis, as held at a low rent by ghatwals or guards of passes.

The preamble of Reg. XXIX. of 1814 is as follows:—"Whereas the lands held by the class of persons denominated ghatwals, in the district of *Birbhoom*, form a peculiar tenure to which the provisions of the existing regulations are not expressly applicable, and whereas every ground exists to believe that according to the former usages and constitution of the country this class of persons is entitled to hold their lands generation after generation in perpetuity, subject nevertheless to a fixed and established rent to the zemindar of *Birbhoom*, and to the performance of certain duties for the maintenance of the public peace and support of the police." *Pachete* was formerly one of the pergunnahs and mehals of zillah *Birbhoom*, but by Reg. XVIII. of 1805 was separated from the jurisdiction of the magistrate of that zillah, and placed under the jurisdiction of a distinct officer to be denominated Magistrate of the Jungle Mehals (see sects. 2 and 3 of that Regulation). Their Lordships consider that the jaghire in question, although not

falling within the Regulation, was a tenure of the nature of those described in the preamble. In the case of *Rajah Nilmoney Singh v. The Government and Others* (1), it having been found by the Lower Courts that the lands were held upon a ghatwali tenure, the High Court upon special appeal held that they were not resumable by the zemindar, upon the ground that the tenure had been forfeited on account of the tenant's refusal to perform them. The Chief Justice remarked, "If the Government received only two thirds of the annual value of the lands as rent or revenue, and allowed the tenant to retain one third on account of services, the services must have been public and not private. The Government would not have allowed any portion of their revenue in consideration of private services to be rendered to the zemindar."

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That case was affirmed by Her Majesty in Council on appeal (2).

The permanent settlement of the lands did not alter the nature of the jaghire or of the tenure upon which the lands were held, nor could it convert the services which were public into private services under the zemindar. The zemindar became entitled only to the rent or revenue which was previously payable to the Government and in respect of which he was assessed, and not to the services in respect of which the one third of the rent or revenue was allowed to the tenant as compensation for the services. Those services continued to be due to the Government.

In the very luminous judgment pronounced by Lord Kingsdown in the case of *Rajah Lelanund Sing v. The Government of Bengal* (3), the origin and nature of the ghatwali tenures of *Birbhoom*, and the effect of the permanent settlement thereon, were fully explained, and it was there held that lands held under that tenure were not resumable by Government under Bengal Regulation I. of 1793, s. 8, cl. 4, as lands included in the allowances to zemindars for thannah or police establishments. In that case it was no doubt held that it was the province of Rajah of *Khuruckpore* to appoint and dismiss the ghatwals (p. 127), but it was also stated that ghatwals held their lands in virtue of sunnuds granted by the zemindar, except some who had received theirs from the former authorities (p. 123), it was also found that in that case the lands had been granted by the ancestors of the Rajah (p. 112),

(1) 6 Suth. W. R. 121.

(2) 18 Suth. W. R. P.C., 321.

(3) 6 Moore's Ind. Ap. Ca. 101.

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and it was said that the regulation did not apply to lands which the zemindars had permitted other persons to hold free from rent, or at a reduced rent, or (referring to the cases in which the sunnuds had not been granted by the zemindar) to lands which such persons had a right to hold free from rent or at a reduced rent.

The above cases shew that the Jaghires of which the lands in question formed one, and which were expressly found, in the case above referred to between the Appellant and *Beer Sing* the father of the Plaintiff, and also in the present case, to be analogous to the ghatwali holdings of *Birbhoom*, are not resumable by the zemindar or by the Government.

In the case of *Hurlah Singh v. Jorawan Sing* (1), cited with approbation by Lord *Kingsdown* in 6 Moore, 125, it was held that the ghatwali tenures were not divisible on the death of a ghatwal, but descended to the eldest son.

In delivering the judgment in that case, Mr. *F. C. Smith* said, "Regulation XXIX. of 1814 says nothing on the subject, the point must therefore be decided with reference to the usual practice, and the meaning and intent of the term ghatwal. Now the ghatwali lands are granted for particular purposes, especially of police, and to divide them into small portions amongst the heirs of the ghatwals would be to defeat the very ends for which the grants were made. I have submitted the question to the Judges of the Court, and all, with one exception, are of opinion that a mehal of this nature cannot be divided, but should, on the death of an incumbent, devolve entirely on the eldest son, or the next ghatwal."

It was stated by Mr. *D. C. Smith*, one of the Judges consulted that the chakeran lands of *Bengal* always go to the eldest son or to the nearest member of the family most capable of performing the duties. See also *Sutherland's Weekly Rep.*, special vol., p. 39.

These jaghires, although hereditary, are not governed by the ordinary rules of inheritance, under the Hindu or Mahomedan law, and are subject to the condition of the Government's approval of the heir.

The same principle which precludes a division of a tenure upon death must also apply to a division by alienation. Their Lordships are of opinion that the tenure is not transferable or saleable

in execution of a decree, and that it is not one of the tenures referred to by the *Bengal Reg. XXXVII. of 1793*, s. 15.

In the case of *Rajah Lelanund Sing v. Doorgobutty and Others* (1) it was held that the ghatwalis of *Kurruckpore* were not capable of alienation by private sale or otherwise, nor liable to sale in execution of decrees except with the consent of the zemindar and his approval of the purchaser as a substitute for the outgoing ghatwal. In that case, however, as in the case already cited from 6 Moore. Ind. Appeals, the ghatwal had been appointed by the Rajah, and the Rajah, and not the Government as in the present case, had a right to appoint and dismiss the ghatwal.

In the case of *Binode Ram Sein v. The Deputy Commissioner of the Sonthal Pergunnahs* (2) it was held, and in their Lordship's opinion rightly, that the surplus proceeds of a *Birbhoom* ghatwal tenure, which had passed by descent from ancestor to heir, were not liable, in the hands of the heir, for the debts of the ancestor; and reference was made to a decision of Mr. *Hawkins* in the Sudder Court (3), in which it was held that the lands were not alienable.

In a case also between the Appellant and the Respondent *Bakranath Singh*, it was held that the holder of the tenure in question in this suit is not responsible for the debts of a former jaghiredar. The Deputy Commissioner in his judgment said, "As jaghiredar, the Defendant has what his father had, a life interest, in the jaghire. Whether the son will succeed or not is, notwithstanding the tenure is hereditary, uncertain, as he may at any moment be dismissed from Government employ," rather he should have said may never be sanctioned as jaghiredar. He proceeds, "The jaghire is strictly a life tenure as far as the jaghiredar is personally concerned, he holds the land in lieu of pay, and a new jaghiredar receiving the jaghire would not be bound by any arrangement made by his predecessor. A newly elected jaghiredar would not be held responsible for debts incurred by the late jaghiredar as such, as were he to be so he would lose the benefit of his pay. Thus, a jaghiredar cannot be held responsible for arrears of rent due by a former jaghiredar." That decision was upheld on appeal to the High Court, 10 Suth. W.R. 255. The case is expressly in point, for

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(1) Suth W. R. (1864) p. 249.

(2) 7 Suth. W. R. 178.

(3) 2 Sevestre's Reports, 423.

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if a successor is not liable for rent of the jaghire due from his predecessor it follows *a fortiori* that he cannot be liable for an ordinary debt. It is unnecessary to decide whether the decision is *res judicata* or not.

The above decisions are more than sufficient to outweigh the decision in the case of *Udoy Churn Chucherbitty* to which Mr. Justice *Markby* attached so much weight, even if that case had not been decided upon a different finding of facts. Their Lordships, however, are of opinion that the learned Judges took an erroneous view in that case of the effect of the permanent settlement.

With reference to the argument upon which Mr. Justice *Ainslie* so strongly relied as to the difficulty under which the zemindar would lie for the recovery of his rent if the lands could not be sold in execution of a decree for rent against his tenant, it is sufficient to say that the zemindar at the time of the permanent settlement must have been aware of the nature of the tenure upon which the lands were held, and that this case does not involve the necessity of deciding what remedy the zemindar has for recovering his rent, whether by sequestration of the estate or by application to the Government to remove the tenant, or by what other mode. Their Lordships therefore abstain from expressing any opinion which would be a mere *obiter dictum* upon the point.

It is quite clear that if the jaghire were transferable without the consent of Government, either by descent to an heir, or by voluntary sale, or sale in execution, or otherwise, there would be no security that the transferee would be a proper person to discharge the duties in respect of which the lands are held at the reduced rent. The transferee might be a person of questionable or even of bad character, as remarked by the Court in *Suth. W. R.* (1864), p. 250.

For the above reasons, their Lordships will humbly advise Her Majesty to affirm the decree of the High Court, from which the appeal has been preferred, and to dismiss the appeal.

The Appellant must pay the costs of the appeal.

Solicitors for Appellant : *Lambert, Petch, & Shakespear.*

RAJAH VENKATA KANNAKAMMA ROW } PLAINTIFFS;
AND OTHERS

AND

RAJAH RAJAGOPALA APPA ROW BA-
HADUR, THE COURT OF WARDS, AND } DEFENDANTS.
OTHERS

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March 15.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Partition—Mesne Profits of Share—Allowances—Limitation.

In a suit for partition by three out of six sons of a deceased zemindar against the eldest son (two brothers being parties Defendant), who wrongly contended that the zemindary was impartible :—

Held, that the Plaintiffs should recover their moiety of the zemindary together with mesne profits accruing thereon for the period of their dispossession thereof, such period not to exceed three years next before the commencement of the suit, and the amount of such mesne profits to be subject to an allowance for all or any portion thereof as might be proved by the Defendants to have been duly applied for the benefit of the joint family.

APPEAL from a decree of the High Court (Jan. 31, 1879) modifying a decree of the District Judge of *Kistna* (March 26, 1877) in a suit brought on the 3rd of February, 1873, against *Rajah Narayya*, the zemindar in possession, and his second and third brothers by his three youngest brothers. The main question at issue in this suit and also in another suit, *Rajah Venkata Karasunha Appa Row Bahadur v. The Court of Wards* (1), was as to the impartibility of the zemindary of *Nuzvid*. Both the above-mentioned Courts held in both suits that the same was impartible. The last-mentioned suit was decreed by the High Court in 1874, but that decree was reversed by Her Majesty in Council in accordance with a judgment of the Privy Council, dated the 13th of December, 1879 (after the decree of the High Court in this suit) and reported in *Law Rep.* 7 Ind. Ap. 38. The

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(1) *Ind. L. R.* 1 Madras, 129.

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Respondents thereupon conceded that the present appeal must as regards the main issue share the fate of its predecessor, and that the present Appellants were entitled to a decree for partition. Some questions, however, remained as to the form of the decree.

Cowie, Q.C., and Grady, for the Appellants, contended that besides a decree for possession of their moiety they were entitled to mesne profits in respect thereof from the 28th of October, 1868, the date of the death of their father until they were put in possession. Their right to possession accrued at that date, and independently of the claim arising out of wrongful dispossession, they were entitled as members of a joint family to an account as against the managing member of his management and dealings with the joint estate: *Abbay Chandra Rai Chowdri v. Pyarimohan Guho and another* (1).

Mayne, for the Respondents, minors in charge of the Court of Wards, contended that the original principal Defendant, their father, had acted fairly in maintaining the impartibility of the zemindary, and the Court of Wards had no alternative but to maintain before the High Court the decree which had been obtained. The account should, in the absence of fraud, or waste, or vexatious defence, be taken upon the present state of the property. Reference was made to *Tarachand v. Reeb Ram* (2) and *Appovier v. Rama Subba Aiyan* (3).

Cowie, Q.C., replied.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

It is not now disputed that the zemindary of *Nuzvid* is not impartible, nor is it disputed that the Plaintiffs Appellants are entitled to recover one half of that zemindary. The only question which is now raised is whether they are entitled to recover mesne profits of that moiety.

Their Lordships are of opinion that they ought to make the

1) 5 Beng. L. R. 347.

(2) 3 Mad. H. C. R. 177.

(3) 11 Moore's Ind. Ap. Ca. 75.

same decree now which the first Court ought to have given when the first Defendant, Rajah *Narayya Appa Row*, was living. The minors, the sons of Rajah *Narayya* appealed to the High Court. If the first Court had given the proper decree, it would have been that the Plaintiffs should recover from the first Defendant, Rajah *Narayya*, one-half of the zemindary of *Nuzvid*, together with the mesne profits of that one half of the estate.

Their Lordships therefore think that the decree of the High Court must be altered; and they will humbly advise Her Majesty that the decree of the High Court be reversed so far it dismisses the claim of the Plaintiffs Appellants to the one half share of the zemindary of *Nuzvid*, and that, in lieu thereof, it be declared that they are entitled to recover from the representatives of the first Defendant out of his assets one half of the said zemindary, with mesne profits thereof from the time of the Appellants' dispossession, provided that they shall not recover such mesne profits for a period exceeding three years next before the commencement of the suit, subject to an allowance to the Respondents for all or any portion of such mesne profits which Respondents may prove to have been duly applied for the benefit of the joint family; and that the case be remitted to the High Court to give effect to these directions. The Respondents must pay the costs of the appeal out of the estate of the first Defendant.

Solicitors for Appellants : *Frank Richardson & Sadler.*

Solicitor for the *India Office* : *H. Treasure.*

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AND

March 22, 23, SANGILI VIRA PANDIA CHINNATAMBIAR DEFENDANT.
May 10.

ON APPEAL FROM THE HIGH COURT AT MADRAS

Mitakshara Law—Assets by descent—Power of Alienation over Estate inherited from Maternal Grandfather.

Held, that the interest which the Defendant took by heritage from his father in an impartible Zemindary was liable as assets by descent for the payment of his father's debts.

Girdhari Lall v. Kantoo Lall (1) approved and declared applicable to the Madras Presidency.

Held, further, that a zemindary to which a Hindu succeeds by inheritance to his maternal grandfather is not his self-acquired property ; but *quaere*, whether he is under the same restrictions as to the alienation or hypothecation thereof as he would have been if it had descended to him from his father or paternal grandfather.

APPEAL from a decree of the High Court (March 3, 1880), which varied a decree of the District Court of *Tinnevely* (Nov. 29, 1876).

The facts of the case were not in dispute, and they, together with the proceedings in this and a former suit, are stated in the judgment of their Lordships.

The questions raised in the appeal related to the nature of the interest which the late zemindar of *Sivagiri* (the Respondent's father) possessed in the zemindary which he had inherited under Mitakshara law from his maternal grandfather; and to the extent of the Respondent's liability for his father's debts.

Leith, Q.C., and *Mayne*, for the Appellant, contended that the zemindary was not the ancestral property of his father in the sense of Hindu law (Mitakshara) so as to vest in the Respondent any interest in the property during his father's lifetime. It descended to the Respondent's father as heir to his maternal

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grandfather. The son accordingly had not the same interest in it; nor was the father under the same restriction as to alienation as he would have been had the estate descended to him from his father or paternal grandfather. In the latter case the son would have had a vested interest and rights co-equal with his father. But that depends upon his being interested in his grandfather's estate. In the former case, that is in the case of an estate descending to a father from his maternal grandfather, the son has no interest in that grandfather's estate. This interest is contingent upon his surviving his father, for a daughter's son's son is not an heir. Consequently he cannot rely upon blood relationship alone in making title, but must aver that his father, who was contingent reversionary heir expectant on his mother's death, survived his mother, and took possession of his maternal grandfather's estate. Wherever it is necessary for a son to make an averment of that nature, he has no power to contest his father's alienation. His inheritance is one liable to obstruction, that is, liable to be defeated by something other than his own death. It has been held that a son cannot prevent alienation by his father of property which the latter inherited collaterally, and that the restriction upon the father's alienation only applies to the grandfather's property: see *Baboo Nund Coomar Lall v. Moulvie Razeeooddeen Hossein* (1); *Mitakshara*, c. 1, s. 5, vv. 9, 10, and again c. 1, sect. 1, vv. 3, 27, 33. The whole of the passages in the *Mitakshara* on this subject must be read as referring to a grandson by male descent: *Mussumat Phoolbas Koer v. Lall Juggessur Sahoy* (2); *Pitam Singh v. Ujagur Singh* (3).

Secondly, the whole zemindary, or at least the Respondent's interest therein which he took by inheritance, was liable as assets by descent in the hands of the Respondent as heir of his father for payment of his father's debts. There is a pious duty on the part of the son to pay his father's debts, and a legal obligation so to do out of the estate which he inherits from his father, except as regards debts contracted for immoral purposes. See *Girdharee Lall v. Kantoo Lall and Othars* (4). [SIR RICHARD COUCH :—In *Kantoo Lall's Case* the debt was contracted before the son's birth.]

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(1) 10 Beng. L. R. 183, 192.

(2) 18 Suth. W. R. 48.

(3) Ind. L. R. 1 Allahabad, 651

(4) Law Rep. 1 Ind. Ap. 321.

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The debt was contracted before and the security given after the son's birth. [SIR RICHARD COUCH :—The debt being contracted before the birth is part of the reasoning on which the judgment proceeds. SIR BARNES PEACOCK referred to *Hunoomanpersaud Panday v. Muss. Babooee Munraj Koonweree* (1), judgment of Lord Justice *Knight Bruce*.] Reference was then made to *Suraj Bunsu Koer v. Sheo Proshad Singh* (2), where the *ratio decidendi* is given at p. 109. See also *Muddengopal Lall v. Musst. Gowrunbutty* (3) a judgment of *Phear, J.*, referring to *Laljeet Singh v. Rajcoomar Singh* (4). Reference was also made to *Adurmoni Deyi v. Chowdhry Sib Narain Kur* (5); *Luchmun Dass v. Giridhur Chowdhry* (6); *Laljee Sahoy v. Fakeer Chand* (7); *Upooroop Tewary v. Lalla Bandhjee Suhay* (8); *Narayana Charya v. Narso Krishna* (9); *Kastur Bhavani v. Appa* (10); *Ponnappa Pillai v. Pappuviengar* (11). See also *Colebrooke's Digest*, book 1, c. 5, pl. 169, 170, 173; *Vyavahara Mayukha*, c. v. s. 4; *Macnaghten's Hindu Law*, c. x. of Debt, Case 3; *Strange's Hindu Law*, c. viii. par. 1; c. ix. par. 3.

The Respondent did not appear.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK :—

The Appellant in this appeal was the Plaintiff, and the Respondent the Defendant, in a suit, No. 13 of 1875, brought in the District Court of *Tinnevelly*. It appears that in an original suit, No. 8 of 1867, brought in the District Court of *Tinnevelly*, the late zemindar of *Sivagiri*, the father of the Defendant, put in a *razinama*, dated the 20th of January, 1868, whereby he acknowledged the sum of Rs.55,872. 12a. to be due, and agreed that the amount should be paid on the 31st of December, 1872, together with interest at one per cent. per mensem, by the instalments

(1) 6 Moore, Ind. Ap. Ca. 421.

(2) Law Rep. 6 Ind. Ap. 88.

(3) 15 Beng. L. R. 265.

(4) 12 Beng. L. R. 373.

(5) Ind. L. R. 3 Calc. 1.

(6) Ind. L. R. 5 Calc. 855 (F. B.).

(7) Ind. L. R. 6 Calc. 135.

(8) Ibid. 749.

(9) Ind. L. R. 1. Bomb. 262.

(10) Ind. L. R. 5 Bomb. 621.

(10) Ind. L. R. 4 Madras, 1.

mentioned therein, and he thereby hypothecated certain lands therein specified, being part of the zemindary, as a security for the payment of the principal and interest.

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On the 4th September, 1868, a decree was passed in accordance with the razinama. The money not having been paid according to the stipulations the property hypothecated was attached, in the lifetime of the late zemindar, for instalments Nos. 1 to 9 mentioned in the razinama. The Plaintiff Appellant, in his plaint in the suit now under appeal, alleged that the whole zemindary was on several occasions attached by other creditors, and that subsequently to the death of the late zemindar, the Plaintiff again attached the hypothecated property on the 23rd of February, 1874, for the tenth instalment of the razinama decree; that the District Court advertised that all the property in the zemindari would be sold in a lot on account of all the creditors; that the Plaintiff presented a petition to the said District Court praying for a separate sale of the hypothecated property mentioned in the decree, or for the sale of the whole zemindary subject to his hypothecation lien; that the Court dismissed the said petition, on the 23rd of February, 1874, without any inquiry; that subsequently, on the 25th of February, 1874, the right, title, and interest of the late zemindar in the whole of the zemindary was sold by auction and purchased by *Subramania Mudaliar* of *Tinnevelly*; that the Defendant presented a petition praying for the release of the attachment made by the Plaintiff for the last instalment, and that on the said petition an order was passed by the Court, on the 18th of April, 1874, to the effect that the attachment ceased with the sale of the zemindary. The Plaintiff further alleged that by reason of the objections and measures taken by the Defendant the judgment debt remained, unpaid, and that the Plaintiff had thereby sustained heavy loss.

The Plaintiff in his plaint also alleged that the zemindary was the self-acquired property of the late zemindar, and, moreover, that the debt acknowledged by the razinama was a just one, having been contracted by the late zemindar for the up-keep of the zemindary for the liquidation of debts contracted on the liability of the whole zemindary before the birth of the Defendant, and for the benefit of the zemindar's family, and he prayed

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that a decree might be passed cancelling the orders passed on the 23rd of February, and the 18th of April, 1874, and upholding the attachment made by Plaintiff in Suit No. 8 aforesaid, confirming his right to recover the judgment debt of the said Suit No. 8 on the liability of the said *Sivagiri* zemindary, and adjudging the sum of Rs.88,062.12a., as per particulars given to be recovered by the Plaintiff, with subsequent interest and costs from the Defendant and on the liability of the property hypothecated to the Plaintiff under the decree in the Suit No. 8, and specified in the schedule thereto, and of all other property that had devolved on him from the late zemindar, and granting such other relief as the Court might deem proper and necessary in the case.

In the particulars given, the sum of Rs.88,062. 12a. was made up of Rs.79,574. 13a. for principal, and Rs. 8487. 9a. for interest due under the decree according to the terms of the *razinama*.

The property mentioned in the schedule to the plaint was the same as that hypothecated by the *razinama*.

No written statement was put in by the Defendant.

The case was tried by the District Judge of *Tinnevelly*, who, on the first hearing, was of opinion that, as the only basis of the plaint was the *razinama* decree in original Suit 8 of 1867, on which the Plaintiff had already taken out execution and received partial satisfaction, the plaint must be thrown out.

On appeal, however, the High Court reversed that judgment, stating that "the questions raised in this suit are the liability of the property in the hands of the present zemindar to satisfy the decree obtained by the Plaintiff against the late zemindar The question of liability and of its extent being one of very considerable difficulty a suit regularly conducted was the most appropriate method of determining it." The case was, therefore, remitted for trial on its merits, and was heard again.

On the hearing, after the remand, the contention of the Defendant was, first, that the suit was not legally maintainable; secondly that the nature of the debt was not proved to be one legally or morally binding upon the present zemindar; and, thirdly, that the late zemindar had no power for this debt to encumber any portion of his estate beyond his own tenure of the property.

The counsel for the Plaintiff sought to shew—

1st. That the debt which is the basis of the suit was one incurred before the birth of the present zemindar ;

2ndly. That it was a *bona fide* debt for absolute necessity and not for mere extravagance ;

3rdly. That the entire zemindary was the self-acquired property of the late zemindar, and could be alienated at will by him, and therefore that the hypothecation created by him was enforceable.

It was stated by the District Judge in his judgment that though no issues were settled, the above points were virtually the issues to which both parties at the final hearing addressed themselves.

The following is the history of the zemindary as found by the District Judge, and concurred in by the High Court :—

“ The zemindari of *Sivagiri* was an ancient polliem of the district of *Tinnevelly*, and was converted into a zemindary with a permanent peishcush by the Government in the year 1803, and the then poligar was granted a sannad-i-milkeut istimrar, and was created first zemindar of *Sivagiri*. He died on the 21st of February, 1819, and, having left no male heir, his only daughter was created second zemindar of *Sivagiri* (Exhibits E 1 and E 2). She died in 1835, and was succeeded by her elder son *Varaguna Rama Pandia Chinnatambiar* (Exhibit E 7), the third zemindar. During his time a new sannad was applied for, in consequence of the original being lost, and was issued to him in October, 1841. Exhibits E 11 to E 19 give the history of the sannad, a copy of which is Exhibit 18. It is in the usual form and concludes with the words ‘ you are hereby authorized and empowered to hold in perpetuity to your heirs, successors, and assigns at the permanent assessment herein named the zemindary of *Sivagiri*.’ This man died the 27th of September, 1873, and has been succeeded by his son *Sangili Vira Pandia Chinnatambiar*, the fourth zemindar, the Defendant ” (Respondent).

In the course of his judgment the District Judge, speaking of suit No. 8 of 1867, made the following observations. He said :—

“ This suit ended in a razinama by which the zemindar pledged himself to pay Rs.55,872 with interest ; and he pledged a certain tank in the village of *Sivagiri* as security for the amount.

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“It was while that suit was in course of execution that the whole zemindary was attached by this Court, and for three years taken into this Court’s management for the liquidation of the judgment creditors, and these Plaintiffs received their shares in the rateable distribution from the produce of the whole estate, viz.,—

- “Rs.7452. 13.7 on the 1st of July, 1872,
- “ „ 4230. 5.9 on the 21st of November, 1872,
- “ „ 7609. 10. 10 on the 20th of January, 1874, and
- “ „ 3777. 3. 5 on the 14th of April, 1874,

in all, Rs. 23,070. 1*a*. 7*p*. in payment of this razinama A 2.

“This suit is brought for the balance of that razinama debt, and the whole arguments of the Plaintiff’s counsel have been directed to shew that the claim is due from the whole estate. Even under the razinamah A 1, which is the basis of this suit, the lien could have only been against the land therein named, viz., certain lands under one tank, but, under the provisions of sect. 271, the Plaintiff as mortgagee, if he wanted to hold his lien upon this one tank, cannot, of course, partake in the rateable distribution, and he would have to reimburse, with its accumulated interest, the Rs. 23,070 which he has received before he could seek to exercise his right as a mortgagee under sect. 271. This principle has been maintained by this Court with regard to other of the judgment creditors who shared in this distribution, and who, like this Plaintiff, having benefited by the attachment of the whole estate and shared in its produce, although he had merely an interest in a fractional portion thereof like this Plaintiff, also sought to get an interest which, if he ever possessed it, he had waived by taking part in the distribution.”

He then, after examining the evidence as to the receipts, the peishcush, and the expenses of the estate, proceeded as follows:—

“I find, therefore, upon the record as it is now before the Court, that this Plaintiff cannot succeed in the present suit,—

“1st Because this claim is based upon a debt which is covered by a decree now in course of execution. This ground has, however, been reversed by the High Court in their judgment.

“2ndly. I find that he cannot succeed as, having taken his

share of the rateable distribution of the proceeds of the whole estate, he is legally prevented by the proviso of sect. 271 from still enforcing his share over his mortgage property. This opinion, before stated, has been confirmed by the High Court in appeal in Civil Miscellaneous Regular Appeal, No. 260 of 1876.

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"Further, though the Plaintiff's counsel urged the Plaintiff's lien over the whole estate, there is no foundation whatever upon the record for such a plea."

"He sought to establish that the debt was one of family necessity. I find it not to be so established....

"The Plaintiff says that this debt is one which the son is legally bound to pay for his father. I find that it is not so....

"The Plaintiff has urged that the zemindary was the self-acquired property of *Varaguna Rama Pandia Chinnatambiar*, the Defendant's father, and that he could therefore alienate the whole of it at will without reference to his sons, and that it is to be governed strictly by Hindu law. I find that it was not his self-acquired property, although it came to him through his mother, but as ruled in his case by the Sudder Court in Appeal Suit, No. 90 of 1851, wherein the whole of the Plaintiff's present argument was advanced and disposed of. I therefore find that the late zemindar had power only to alienate his life interest for his debts, and not to alienate his son's reversion, and moreover that, in point of fact, he did not attempt so to alienate it for the present Plaintiff's debt.

"For all these reasons I find that the estate now in the hands of the zemindar (Defendant) is not liable to satisfy the Plaintiff's judgment claim against the late zemindar, and further that the Plaintiff is, as above stated, legally debarred from bringing this suit."

"I therefore dismiss this suit."

Their Lordships think it right here to remark that there was great irregularity in the district Judge's proceeding to a final hearing without issues having been settled, so that the parties might before the trial know to what points they would have to address themselves, and also in his having, in direct opposition to the judgment of the High Court, held in his judgment, after the

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remand, that the Plaintiff was legally debarred, as above stated, from bringing his suit.

The Plaintiff appealed from the decree of the District Judge to the High Court upon the following grounds, viz :—

1. That the Plaintiff was entitled to a decree for the amount claimed.
2. That the zemindary of *Sivagiri* came to the Defendant burdened with the debts of his father, whether incurred before or after Defendant's birth, and having assets of his father in his possession he was liable for his father's debts to the extent of the assets.
3. That the District Judge was in error in holding that the Hindu law did not apply.
4. That the zemindary was the self-acquired property of the Defendant's father, or at all events it was not property in which the Defendant acquired any rights by reason of his birth. The Defendant merely succeeded to the estate left on his father's death and had no independent rights in the property.
5. That if the zemindary should be held to be ancestral property in which the Defendant acquired rights by his birth, the Plaintiff was still entitled to charge his debt upon the zemindary, the Plaintiff's debt having been incurred in circumstances which would make it a binding charge upon the estate.
6. That the Plaintiff was not precluded, as the Judge held, from maintaining the suit.

Upon that appeal the High Court, after adverting to the nature of the suit and to the contentions of the Plaintiff and Defendant respectively, proceeded as follows :—

“ The lower Court originally held that the suit was not maintainable, but on appeal it was decided by this Court that the question of the liability of the estate in the hands of the Defendant to satisfy the decree against his father was one of considerable difficulty, and that a regular suit was the most appropriate mode of determining it. The history of this zemindary, in so far as it is necessary for the purpose of this suit is sufficiently set forth in paragraph 8 of the judgment appealed against. In his

revised judgment the district Judge considers that, as the second zemindar was a woman, the third zemindar would, under the ordinary Hindu law, have held the zemindary as his self-acquired property, but that he had not held it as such by reason of its being an impartible estate, held exceptionally under a sannad (Exhibit E 18) from the Government. The first question for decision is whether the Hindu law is not applicable in this case. It seems to us that the sannad only rendered permanent the peish-cush or assessment, which had varied from time to time, changed the character of the estate, which had till then been that of a southern polliem, into that of ordinary Hindu property, and recognised the ordinary Hindu law as governing the succession to it in order to determine the right of interference exercised by Government on the ground of tenure, without prejudice to impartibility or any other special incident which has already attached to the estate by the custom of the family, originating no doubt in the ancient tenure. We are therefore of opinion that the zemindary, though impartible by custom, is doubtless governed by the Hindu law, subject, as observed by the Privy Council in 9 Moore, I. A., 685, to such modifications as flow from its impartibility.

“ This view brings under our consideration the next question, whether, when the zemindary vested in the Defendant’s father, it became his self-acquired property. In support of this contention it is urged for the Appellant, 1st, that the second zemindar was a woman ; 2ndly, that she took an obstructed heritage ; and, 3rdly, that when it passed into her son’s possession it ceased to be ancestral property in which his son (Defendant) had ownership by birth.

“ For the reasons mentioned in our judgment in the *Shivagunga* case, we think that though a daughter, inheriting to her father, succeeds as heir, and does not take, as is at times stated, merely a life estate, still she takes but a qualified heritage, which, under the text of Catyayana, passes upon her death to her father’s in preference to her own heirs. Her succession being thus rather a case of obstruction or interposition than of regular inheritance for herself and her own heirs, and the estate taken by her being, moreover, as observed in that judgment, not her stridanan, her intervention as heir does not, in our opinion, alter what was

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originally ancestral into self-acquired property. According to all the texts of the Hindu law of which we are aware, the absence of paternal or maternal property or of any aid from it is a necessary ingredient in the conception of self-acquired property, and the author of the Mitakshara defines it as property which has been acquired by the co-parcener himself without any detriment to the goods of the father or mother (Mitakshara, chap. 1, sect. 4, c. 2). We think it is clearly erroneous to say that property inherited through a mother is self-acquired as between her son and grandson.

“It may not be ancestral in the sense in which property inherited by the father from the *paternal* grandfather is liable to partition under the Mitakshara law at the instance of the son, but it is not self-acquired property on that ground for purposes other than those of partition.”

The High Court then, after considering the question whether the restriction as to the alienation of ancestral property, imposed upon a father by the Mitakshara law in regard to property descended from his father or paternal grandfather extended to property descended from his maternal grandfather, expressed their opinion that the contention of the Plaintiff that the zemindary should be treated for the purpose of alienation as if it had been self-acquired by the father was not well founded.

They then proceeded thus:—

“The next question for decision is whether the debt sought to be recovered, which though in part improvident, is neither immoral nor vicious, and which ‘is further partly secured by a mortgage,’ is binding on the present zemindar, ‘the Defendant in the suit and the Respondent in the appeal, who was not born when it was contracted.’ ”

In determining that question they say :—

“As to the contention that a debt may not have been incurred for family necessity and may still be binding on the son, provided that it is neither immoral nor vicious, we do not clearly see our way to uphold it. According to the text of *Yagnyavalkya*, the alienation of immoveable property without the son’s consent is forbidden, and, according to the text of *Vrihaspati*, the father can only alienate it where there is a family necessity. It is then

argued that, as observed by the Judicial Committee in *Girdharee Lall v. Kantoo Lall* (1), the son is under a pious obligation to pay the father's debt where such debt is neither immoral nor vicious.

"There can be no doubt that it is the pious duty of a son to pay his father's debt. *Narada* says that father's desire male offspring for their own sake reflecting 'this son will redeem me from every debt due to superior and inferior beings.' Therefore, a son begotten by him should relinquish his own property and assiduously redeem his father from debt lest he fall into a region of torment. If a devout man or one who maintained a sacrificial fire die a debtor, all the merit of his devout austerities or of his perpetual fire shall belong to his creditors. (1 Dig. Higg. Edition 202.)

"If this text is to be enforced as imposing a legal duty, we shall have to compel sons who have inherited no property from their father, either ancestral or self-acquired, to pay the father's debt, for the text directs him to pay it from his own property. Again, this pious obligation is confined to the son and grandson, and does not extend to the great grandson, and in the case of the grandson it is limited to the payment of the principal. *Vrihaspati* says, 'the sons must pay the debt of their father, when proved, as if it were their own, or with interest; the son's son must pay the debt of his grandfather, but without interest, and his son or the great grandson shall not be compelled to discharge it unless he be heir and have assets.'

"*Vishnu* observes likewise, 'If he who contracted the debt should die, or become a religious anchorite, or remain abroad for twenty years, that debt shall be discharged by his sons or grandsons, but not by remoter descendants against their will.' (1 Dig. Higg. Edition 185.)

"Thus, the obligation does not depend on the relation as partakers of the same funeral cake and is not co-extensive with the capacity to inherit.

"Consequently, if there are sons, grandsons, and great grandsons, the obligation must be held to be valid to the full extent of the debt as against the first, to the extent of the principal as against the second, and not at all as against the third. Again,

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the allusion in the text of *Narada* to 'every debt due to superior and inferior beings' would seem to favour the view that pious duties were enforced by Hindu tribunals in the exercise of their Jurisdiction over matters which are purely spiritual. When the learned Advocate-General is pressed with these difficulties in recognising the son's pious obligation as a legal obligation, he argues that though it is not to be enforced as such where no assets are inherited, still the son's ownership in ancestral property is subordinate to that of the father, and the father's predominant interest gives it the character of a legal duty with respect to the alienation of ancestral property. But in chapter 1, sect. VI, 9, the author of the *Mitakshara* says, 'The grandson has a right of prohibition, if his unseparated father is making a donation or sale of effects inherited from the grandfather, but he has no rights of interference if the effects were *acquired* by the father. On the contrary, he must acquiesce because he is dependent.' In p. 10 he states, 'Consequently the difference is this : Although he has a right by birth in his father's and grandfather's property, still, since he is dependent on his father in regard to the paternal estate, and since the father has a predominant interest *as it was acquired by himself*, the son must acquiesce in the father's disposal of his own acquired property; but since both have indiscriminately a right in the grandfather's estate, the son has a power of interdiction (if the father be dissipating it).' According to *Vignyanesvara Yoga*, the author of the *Mitakshara*, the son's ownership in ancestral estate is not subordinate but co-ordinate, and it is dependent only where the father himself acquires the property. The course of decisions in this Presidency from the date of the case cited in Mad. High Court Rep. 47, has been to recognise equal ownership by the son in the grandfather's estate, though it may not be divided between the father and the son and to uphold the father's alienation only to the extent of his share, though in *Bengal* it has been held that an undivided share is not alienable. This difference in the view of the two High Courts is referred to by the Judicial Committee in *Deen Dyal Lal v. Jugdeep Narainsingh*(1).

"In these circumstances, it is not easy to conclude that the Lords of the Judicial Committee intended to vary the course of

(1) Law Rep. 4 Ind Ap. 252.

decisions in this Presidency. In the decision in *Kantoo Lall's* case there are remarks which shew that the father and son were probably acting in collusion with one another against the purchaser and that the suit was not brought till ten years after the sale was completed.

“The pious duty of a son may be a foundation for presuming the son's concurrence in the alienation by the father when, with the knowledge of it, the son elects to remain in co-parcenary with the father, and takes no step to set aside the alienation, until the father becomes destitute after a considerable lapse of time, when, acting in collusion with him, he tries to upset a transaction in which he may be fairly presumed to have acquiesced in the special circumstances of the case. Furthermore, the property now in litigation is an impartible zemindary, in which the son cannot protect his interest as in ordinary property by electing a division. The only question then which remains to be considered is, whether the debt now in dispute was incurred under family necessity. The court below holds that there was no necessity for contracting the debt. Though we concur in the view that, under more prudent management, the arrears of peishcush in 1853 might have been avoided, still we think that, in so far as the plaint debt was applied to the liquidation of debts which had been contracted for paying the assessment, it is binding on the Defendant. The original lender advanced the money to relieve the zemindary from attachment for arrears of peishcush, and he was bound only to look to the immediate pressure on the estate and the benefit accruing to it from the advance. There is nothing in the evidence to lead us to the conclusion that this was a fraudulent contrivance between the late zemindar and the creditor to enable him to apply the income from the estate to purposes other than those warranted by the law. To this extent we think that the debt is binding upon the zemindary.

“We shall, therefore, vary the judgment appealed against so as to adjudge to the Plaintiff Rs.26,049. 4a. 7p. with proportionate costs on the security of the zemindary, and otherwise confirm it.”

Upon that judgment the following decree was recorded:—

“This Court, in variance of the revised decree of the Lower Court, doth order and decree that the Plaintiff do recover the sum

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of Rs. 26,049. 4*a*. 7*p*., with proportionate costs in this Court and in the lower Court on the amount now adjudged; and this Court doth further order and decree that the zemindary of *Sivagiri* shall be liable for the satisfaction of the decree amount and costs now adjudged, and that the decree be in other respects confirmed."

From that decree a petition of review was presented by the Plaintiff.

The Defendant also applied for a review of judgment upon the ground that the calculation upon which the decree was based was erroneous, and that the amount decreed was too high.

The reviews were admitted and in delivering his judgment the learned Judge Mr. Justice *Muttusami Aiyar*, before whom the reviews were heard, declared that he still adhered to the principles on which the decision passed by the late Chief Justice Sir *Walter Morgan* and himself rested, and confined himself in dealing with the petitions of review to errors of calculation and to those matters which shewed that the decree had not been drawn up in conformity with the judgment, and then after dealing with the errors in calculation and declaring that the error should be corrected in the mode indicated, proceeded,—

"It is also from oversight that the decree contains no provision for payment of interest at 6 per cent. per annum until date of payment. The Respondent has no objection to the amount decreed being held to be a special charge on the village mentioned in the plaint. The decree should be amended in this respect also."

The first decree of the High Court was accordingly amended, and the final decree passed on review was entered as follow:—

"This Court, in variance of the revised decree of the lower Court, doth order and decree that the Defendant do pay to the Plaintiff the sum of Rs.35,132. 11*a*. 9*p*., with further interest at 6 per cent. per annum upon Rs.32,284 from the 22nd of February, 1875, the date of the plaint, till date of payment, and that the zemindary of *Sivagiri* be liable for the satisfaction of the decree, amount, and costs, now adjudged. And this Court doth further order and declare that the said amount forms a valid charge over the property mortgaged to the Plaintiff and described in the

schedule hereunto annexed. And this Court doth further order and decree payment of proportionate costs incurred both in this Court and in the lower Court upon the amount allowed and disallowed respectively. And it is hereby ordered that the Defendant do pay to the Plaintiff Rs.1692. 6*a*. 6*p*., being the amount of nett costs as admitted by both parties due to Plaintiff after deducting the costs due by him to the Defendant.

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"Rasingaperikulam, consisting of 589 kotas, 4 merkals, and $\frac{1}{8}$ measure seed, wet land, inclusive of maniam lands, in the cusba village of Sivagiri, in the Defendant's zemindary."

From that decree the present appeal was preferred. The Defendant did not appeal or file any cross appeal.

It was contended on the part of the Plaintiff, first, that the zemindary, having descended to the Defendant's father from his maternal grandfather, was his self-acquired property, or at any rate that he was not as regards his son under the same restrictions as to the alienation or hypothecation of the property as he would have been if it had descended to him from his father or paternal grandfather; secondly, that the whole zemindary, or at least the interest which the Defendant took therein by heritage, was liable as assets by descent in the hands of the Defendant, as the heir of his father, for the payment of his father's debts. Their Lordships are of opinion that the Appellant is entitled to succeed upon the second ground, and they therefore think it unnecessary to express any opinion upon the first. Indeed, as the case has been argued before them on one side only, and the same question may hereafter be raised in some other case, they consider it right to abstain from expressing any opinion upon it, except that they concur with the High Court in holding that the property was not the self-acquired property of the Defendant's father.

As to the second ground, they consider that the case is governed by the case of *Girdharee Lall v. Kantoo Lall* (1). The doctrine there laid down was not new, but was supported by the previous cases therein cited. The principle of that case was adopted by this Board in the case of *Suraj Bunsu Koer* (2), and has been

(1) Law Rep. 1 Ind. Ap. 321.

(2) Law Rep. 6 Ind. Ap. 104.

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very properly acted upon in *Bengal*, and *Bombay*, and in the North-West Provinces, and although it was not acted upon by the High Court in *Madras* as it ought to have been in the case now under appeal, it has since been acted upon in a Full Bench decision by all the Judges of that Court, except two who dissented, of whom Mr. Justice *Muttusami Aiyar* was one, in *Ponneappa Pillai v. Pappuviengar* (1), decided the 1st of April, 1881.

The reasons given in the judgment of the High Court in the present case constitute no ground for the opinion that the case of *Kantoo Lall* does not apply to the *Madras* Presidency. It was said in the judgment in that case : "There is no suggestion either that the bond or the decree was obtained benamee for the benefit of the father, or merely for the purpose of enabling the father to sell the family property and raise money for his own purpose. There is nothing of the sort suggested and nothing proved." That statement certainly did not justify the assertion of the High Court, which was clearly a mistake, that in that case there were remarks which shew that the father and son were probably acting in collusion with one another against the purchaser."

One of the grounds relied upon by the High Court for considering that the case of *Kantoo Lall* was not applicable to the *Madras* Presidency was that the course of decisions in the *Madras* Presidency had been to uphold the father's alienation to the extent of his own share, though it was said to have been held in *Bengal* that an undivided share is not alienable, a difference referred to by the Judicial Committee in *Deen Dyal Lal's Case* (2). Assuming without admitting that the difference exists (see the remarks in 6 Law Rep. Ind. App. 102) it is impossible to see how the father's power to alienate his own share could constitute a valid reason for supposing that where that law existed the son's share taken by heritage from the father was thereby exempted from liability for the payment of his father's debts. The fact of the zemindary being impartible could not affect its liability for the payment of the father's debts when it came into the hands of the son by descent from the father. Their Lordships are of opinion that no order ought to be made for cancelling the orders of the 23rd of February, and the 18th of April, 1874, or for

(1) Ind. L. R. 4 Madras, 1.

(2) Law Rep. 4 Ind. Ap. 262.

upholding the attachment made by the Plaintiff in Suit No. 8. By such a decree, the rights of other creditors and those of the purchaser under the sale of the 25th of February, 1874, might be affected, and none of them are parties to this suit. Those orders and that attachment do not affect the rights of the Plaintiff as against the Defendant. It would seem from the proceedings in the District Court of *Tinnevelly*, of the 18th of April, 1874, and the statement in the 10th paragraph of the plaint taken together, that the life interest of the late zemindar, the father of the Defendant, in the whole zemindary, including the part hypothecated, have been sold to a *bona fide* purchaser. That sale cannot be affected as to whatever legally passed under it by any decree in this suit. The learned Judge of the High Court who heard the case in review, and who declared in the decree that the amount decreed forms a valid charge over the property mortgaged to the Plaintiff, did not allude to the decision of the district Judge as to the abandonment by the Plaintiff of his lien under the hypothecation by partaking of a rateable distribution with the other creditors of the father, nor did he intend to affect nor could he affect by that declaration the rights of persons not parties to the suit, nor did he intend to nor could he by declaring that the zemindary of *Sivagiri* should be liable for the satisfaction of the decreed amount and costs affect the rights of the purchaser under the sale admitted by the Plaintiff in the 10th paragraph of his plaint. The Defendant is liable for the debts due from his father to the extent of the assets which descended to him from his father, and all the right and interest of the Defendant in the zemindary which descended to him from his father became assets in his hands, and that right and interest, if not duly administered in payment of his father's debts, is liable as against the Defendant to be attached and sold in execution of the amount that may be decreed against him.

Their Lordships will therefore humbly advise Her Majesty to reverse the decrees of the High Court and of the District Court respectively, and to decree and declare that the Defendant, as the son and heir and legal representative of *Varaguna Rama Pandia Chinnatambiar*, deceased, the late zemindar of *Sivagiri*, do pay to the Plaintiff, out of the property which was of the said *Vara-*

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guna Rama Pandia Chinnatambiar, deceased, and which came to the Defendant by heritage, the amount due on the 2nd of March, 1875, under the decree of the 4th of September, 1868, mentioned in the plaint filed in the Suit No. 13 of 1875 in the District Court of *Tinnevelly*, together with interest on the amount so due, at the rate of 6 per cent. per annum, from the 2nd March, 1875, to the time of realization, and, further to declare that, so far as the Defendant is concerned, all the right, title, and interest, which descended to him from his father and came to him by heritage, as well in that part of the zemindary of *Sivagiri* which was hypothecated by his father, as in that part thereof which was not hypothecated, are liable, so far as they had not been administered in payment of his father's debts, to be attached and sold in execution of the amount for which it shall be declared that the Defendant is liable, together with such interest as aforesaid, after giving credit for any portions thereof, if any, which since the said 2nd day of March, 1875, have been paid or satisfied; and, further, that the case be remanded to the High Court with directions to ascertain and determine what amount was on the said 2nd day of March, 1875, due under the said decree of the 4th of September, 1868, and whether any and what portion or portions thereof has or have been satisfied or discharged since the said 2nd day of March, 1875, and to pass a decree in accordance with the above directions, and awarding costs both in the District Court and in the High Court in proportion to the amounts decreed and disallowed respectively.

And it is hereby ordered that the costs of this appeal be paid by the Respondent.

Solicitors for Appellant : *Burton, Yeates, Hart, & Burton.*

PORESHNATH MOOKERJEE DEFENDANT;

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ANATHNATH DEB PLAINTIFF.

May, 11.

ON APPEAL FROM THE HIGH COURT AT BENGAL.

Estoppel--Plea.

A dur-putnidar defeated a suit for rent brought by his putnidar (who was also zemindar) on the plea that he had parted with his dur-putni interest to his wife and son, who were accordingly sued, and their dur-putni interest sold in execution to the zemindar.

In a suit by the Zemindar, suing as dur-putnidar, against his tenant, the Appellant intervened and claimed title to the dur-putni under a mortgage from the former Defendant (made subsequent to the dismissal of the former suit). He alleged that the wife and son were merely benameedars and that he had completed his title by a purchase in execution of a decree obtained on his mortgage:—

Held, that the Appellant, who admittedly would have been estopped as mortgagee by the plea of [his mortgagor from setting up his present claim, was in no better position by reason of his purchase in execution.

APPEAL from a decree of the High Court (Nov. 21, 1878) reversing a decree of the District Judge of zillah *Beerbhoom* (Jan. 18 1877) whereby the Respondent's suit was dismissed with costs.

The Respondent sued one *Bistoo Chunder Roy*, originally sole Defendant, to recover from him as ijardar or lessee for a term the rent due in respect of certain lands called *Hooda Loba*, to the rent of which the Respondent claimed to be entitled as purchaser at a sale in execution of the interest of the lessors; *Dhun Krishna Sen*, and another. *Poreshnath* intervened on the allegation that he and not the Respondent was entitled to receive that rent, as the true lessor was one *Ishan Chunder Sen*, father of *Dhun Krishna*, and that *Dhun Krishna* and the other nominal lessor were benamee for *Ishan*; and that he (*Poreshnath*) had at another sale in execution purchased the interest as such lessor of *Ishan Chunder Sen*. The Judge held that *Poreshnath* had established his allegation, and that the Respondent had no right to the rent in question.

Present:—SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

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The High Court in appeal held that the rule laid down in *Pickard v. Sears* (1) was applicable to the circumstances of this case, and that the Appellant was estopped, under the circumstances stated in the judgment of their Lordships, as *Ishan Chunder* would have been, from setting up a claim inconsistent with certain representations made by *Ishan Chunder*, which had induced the Respondent to believe, and to act upon such belief, that *Dhun Krishna Sen* and another were the true owners of the interest in question.

Leith, Q.C., and *Doyne*, for the Appellant, contended that it was not proved that the Respondent had been induced to purchase from the benameedars on the representation of *Ishan Chunder* that they were absolutely entitled. The evidence shewed that the Respondent had notice of the fact that the transfer by *Ishan Chunder* to his wife and son was benamee. Even if that were not so, *Poreshnath* did not take directly from *Ishan Chunder* either as mortgagee or as assignee and was not bound by his representations. He obtained a decree on a mortgage bond, and at a sale in execution of that decree became the purchaser of the land in suit. Reference was made to the *Indian Evidence Act*, 1872, s. 115; *Co. Litt*, 352, a; *Comyns' Digest*, Estoppel; *Richards v. Johnson* (2); *Dinendronath Sannyal v. Rancoomar Ghose* (3).

Woodroffe, for the Respondent, was not called upon.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH :—

The question in this appeal which is from a decision of the High Court at *Calcutta* on an appeal from the District Court, is stated by the learned Chief Justice in giving the judgment of the High Court, in which he says :—"The point upon which, in our opinion, this case should be decided is rather of a peculiar nature. The Plaintiff is the zemindar of a share in a property called lot *Shahalumpore*, and he also claims to be the dur-putnidar of a portion of the same property. In his character of dur-putnidar, he brings this suit against the Defendant No.1,"—*Bishtoo Chunder*

(1) 6 Ad. & E. 474.

(2) 4 H. & N. 660.

(3) Law Rep. 8 Ind. Ap. 71.

Roy,—“ as ijardar of part of the estate for rent and for road-cess. The Defendant resists the claim upon the ground that *Poreshnath*, the Defendant No. 2, is the real owner of the dur-putni ; and the Defendant No. 2 has intervened for the purpose of supporting his title to the rent as against the Plaintiff. It appears that some time ago, in the year 1259 (A.D. 1852), one *Ishan Chunder* purchased and was the undoubted owner of this dur-putni estate. In the year 1265 ” (A.D. 1858), *Ishan “ Chunder*, being in difficulties, sold or professed to sell the dur-putni to his wife, *Kripamoyi* and his son *Dhun Krishna* ; and thereupon the names of *Kripamoyi* and his son *Dhun Krishna* were entered in the Plaintiff’s *serishta* as the owners of the dur-putni.” It has been suggested that this is not correct : there is a question whether it was in the Plaintiff’s *serishta*, but it is not material :—“ After this sale, the rent of the dur-putni being in arrear, the Plaintiff (whether in ignorance of the sale or not does not appear) brought a suit for the rent against *Ishan Chunder*, who defended the suit upon the express ground that he was no longer the tenant, and that he had parted with his interest in the dur-putni to his wife and son; and he not only defended the suit on this ground, but he stated in his evidence that the sale to his wife and son was an absolute and *bona fide* one ; that the dur-putni really belonged to them, and that he had no right or interest in it.”

It appears from what has been stated by the learned counsel for the Appellant, that in this suit *Ishan Chunder* put in a written statement to this effect on the 7th of November, 1872, and the suit was dismissed on the 18th of November, 1872. The learned Chief Judge proceeds :—“ Upon the strength of this evidence *Ishan Chunder* defeated the Plaintiff’s suit, and the Plaintiff had to pay the costs of it. Having failed in that suit, the Plaintiff then brought another suit for the same rent against *Kripamoyi* and *Dhun Krishna*. He obtained a decree against them, and under that decree the dur-putni was sold, and the Plaintiff himself became the purchaser of it. Upon the title thus acquired the Plaintiff brings the present suit against the Defendant No. 1,” *Bishtoo Chunder Roy*,—“ the ijardar of that portion of the property ; and assuming that the title derived in this way is a good one, there is no doubt as to his right to recover the rent as

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against the Defendant No. 1." Then the learned Chief Justice alludes to the question of the amount to be recovered which the Appellant was willing to give up, and in order to avoid the necessity of a remand, says: "Consequently the only point for our consideration is, whether the Plaintiff on the one hand, or the intervening Defendant on the other, is entitled to the rent of the dur-putni. The claim which the intervening Defendant sets up is by right of *Ishan Chunder*. He says that *Ishan Chunder* mortgaged the property to him, and that such proceedings have been taken upon that mortgage that he is now entitled, in *Ishan Chunder's* rights, to the rent of this property as the owner of it."

The proceedings thus alluded to were these: On the 11th of January, 1873, about three months after the written statement had been put in by *Ishan Chunder*, and the suit had been dismissed, a mortgage bond was given by *Ishan Chunder* to *Poreshnath*, who brought a suit upon it and obtained a decree on the 6th of September, 1875; which Mr. *Leith*, who was counsel for the Appellant, stated, although the form of the decree does not appear, was the ordinary decree as upon a mortgage bond. On the 13th of September, 1875, he obtained an order for sale in execution of that decree, and the sale took place on the 18th of December, 1875, being a sale of the right, title, and interest of *Ishan Chunder*, and *Poreshnath* became the purchaser for the sum of Rs.5600. The certificate of sale was granted on the 24th of March, 1876, and in that it is stated that *Poreshnath* purchased the property for Rs.5600, and had put in a receipt crediting the amount of consideration against the decretal amount received by him. In fact he did not pay any money upon the purchase which he had made at the sale, but became the owner of the property in satisfaction of his mortgage. It was decided by the First Court that the intervening Defendant had a right to go into the question whether *Ishan Chunder* were the real owner of the dur-putni or not, and that Court found upon the evidence that the sale by him to his wife and son was a benamee transaction, and that *Ishan Chunder* was the owner. Consequently the question really is whether *Poreshnath* is estopped by the written statement which *Ishan Chunder* made in the former suit. The learned Chief Justice says: "It appears to us that, inasmuch as the intervening

Defendant claims under *Ishan Chunder*, and can take no better title than *Ishan Chunder* himself, and as *Ishan Chunder* has directly induced the Plaintiff to believe that he had sold his property absolutely to his wife and son and led him to bring a suit against them for the rent, and under the decree obtained in that suit to purchase their interest in the property, it does not lie in the mouth of *Ishan Chunder*, or any one claiming under him by a subsequent title, to set up a claim to the rent in this suit as against the Plaintiff."

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Their Lordships think that is a right conclusion; that, looking to what took place, *Poreshnath* cannot be considered as having put himself, by reason of his purchase at the sale which he had brought about in execution of his decree on the mortgage bond, in a better position than he was in as mortgagee taking from *Ishan Chunder*. It is admitted that, if he had claimed as a mortgagee or as an assignee of *Ishan Chunder*, he would be estopped; and their Lordships think that he is substantially in the same position, that he did not by purchasing in this way put himself in a better position, and consequently that he is estopped by the statement which *Ishan Chunder* made, and that the decree of the High Court is correct.

Their Lordships will therefore humbly advise Her Majesty to dismiss the appeal; and the costs thereof will be paid by the Appellant.

Solicitors for the Appellant: *Oehme & Summerhays*.

Solicitor for the Respondents: *T. L. Wilson*.

J. C.* EDWARD D. SINCLAIR . . . , . . . PLAINTIFF ;

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AND

May 12,
16, 17;
June 23.

L. P. D. BROUGHTON (ADMINISTRATOR
GENERAL OF BENGAL, AND ADMINISTRATOR
TO THE ESTATE OF SIR HENRY TOMBS,
DECEASED), AND THE GOVERNMENT
OF INDIA DEFENDANTS.

ON APPEAL FROM THE COURT OF THE COMMISSONER OF LUCK-
NOW AND FROM THE COURT OF THE JUDICIAL COMMIS-
SIONER OF OUDH.

*Illegal Arrest and Detention—Powers of the Commander of Military Canton-
ments—Act XVIII. of 1850—Dangerous Lunatic—Act XXXVI. of 1858.*

Act XVIII. of 1850 is an Act for the protection of judicial officers acting
judicially and of officers acting under their orders.

In a suit against the officer in command of the military cantonments in
Lucknow for damage to the Plaintiff, in consequence of the Defendant having
put him under an unlawful arrest and having wrongfully confined him
in his own premises for three successive days, and for having caused violence
to be used to his person and property ; it appeared that the Defendant had
acted *bona fide*, and under the erroneous belief that the Plaintiff was danger-
ous, by reason of lunacy ; that he had put him into confinement in order
that he might be visited and examined by medical officers until such officers
should feel themselves justified in reporting whether he was a dangerous
lunatic or not ; that he had after such medical officers had reported him per-
fectly sane, kept him on their recommendation in restraint in order that he
might be removed from the cantonment and placed under the observation of
the civil surgeon :—

Held, that the Defendant had acted without legal authority under
Act XXXVI. of 1858 or otherwise, that he was not protected by Act XVIII.
of 1850 or otherwise, and that he was liable in damages to the Plaintiff.

APPEAL *in forma pauperis*, by special leave, from a judgment
of the Commissioner of *Lucknow* (July 2, 1874) whereby the
damages awarded to the Appellant by the Judge of the Civil
Court of *Lucknow* (May 12, 1874) in respect of wrongful impri-
sonment, were reduced from Rs.3000 to Rs.300, and from a judg-
ment of the Judicial Commissioner of *Oudh* (Nov. 17, 1874),

* *Present* :—SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT
P. COLLIER, and SIR JOHN MELLOR.

whereby the above-mentioned judgment of July 2, 1874, was reversed and the Appellant's suit dismissed.

This suit was instituted on the 3rd of November, 1873, by the Appellant *in forma pauperis* in the Civil Court, against General Sir *Henry Tombs* to recover damages, laid at Rs. 25,000, in respect of the wrongful imprisonment of the Appellant in his own premises on the 1st, 2nd, and 3rd of November, 1872, under the orders of the Defendant.

Under Act VIII. of 1859, sect. 70, the Government of *India* undertook the defence of the suit on behalf of the Defendant.

On the 12th of February, 1874, the Defendant, just before leaving for *England*, where he shortly afterwards died, filed a written statement wherein he, after referring to the conduct of the Appellant and to the claim made on him for protection by the lady residing in the opposite house, among other things, set forth that after due inquiry into the Appellant's sanity he, as officer commanding the cantonment and consequently in general control of the police within its limits did, in good faith, and considering himself bound in the interests of public safety so to do, place an unarmed guard of soldiers over the Appellant in substitution for the police originally employed by him for that purpose and confined him to his own house until the return of the cantonment magistrate, honestly believing when he did so that the Appellant was dangerous by reason of lunacy actual or impending, to himself and others.

The facts of the case are stated in the judgment of their Lordships.

The following issues were settled:—

1. Was Defendant guilty of false imprisonment?
2. If so, was Defendant justified in his act, either on the representation of the medical officer or in the interests of the public?
3. Was Defendant, as the officer commanding the cantonment of *Lucknow*, competent to take up the duties of the police, on his treatment of Plaintiff under the provisions of Act XXII. of 1864, sect. 11, or otherwise?
4. Was Defendant empowered, under the provisions of Act XXXVI. of 1858, in making over the Plaintiff to the court of the cantonment magistrate, or did he so under due course of law?

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- J. C. 5. Was Plaintiff subject to undue violence and ill-treatment,
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 — dant ?
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 — 6. Are the damages at which the Plaintiff has assessed his claims
 excessive, and, if so, what damages, if any, is Plaintiff fairly and
 reasonably entitled to ?

On the 12th of May, 1874, the Civil Judge of *Lucknow* pronounced judgment in the suit. He observed that the violent fits of temper and uncontrolled passion displayed by the Appellant, combined with acts of a peculiar and eccentric character, had brought his sanity into question, and that the conclusion which the public had, rightly or wrongly, drawn from them, had in all probability influenced the Defendant in taking the measures which he, as officer in command of the Division had, on witnessing the Appellant's conduct on the 1st of November, 1872, considered it necessary to take, in the interests of the public. He found that those acts and that conduct were not in themselves sufficient to justify the conclusion that the Appellant was labouring under any aberration of his mental faculties, necessitating a resort to those measures, and that on the evidence of Drs. *Guthrie* and *Scott* he must be taken not to have been insane, or in any way dangerous, when they visited him on the Defendant's request, and he held that the Defendant had no authority to act against the Plaintiff in the manner established by the evidence. He thus summed up his conclusion :—

“ Whilst, then, there is established a clear case of false imprisonment, on insufficient grounds, it is at the same time equally manifest that General *Tombs* was not actuated by any malice or personal feeling against the Plaintiff. He was a perfect stranger to him. Nothing had passed before the arrest which would induce the belief that the General had used his position and authority, intentionally, to the injury and degradation of the Plaintiff. From all I can make out it is unquestionable that the General acted, as he represented the matter to the Government of *India*, in the discharge of a public duty, having in view, no doubt, those antecedent acts of the Plaintiff, established by the evidence by which he had unfortunately acquired some notoriety.

“ Notwithstanding all this, I am of opinion that the Defendant

has rendered himself legally liable. He may have acted, as he thought, in the public interest, but he had no authority to resort to extreme measures, nor did the necessity arise for such a mode of procedure, and that he acted erroneously admits of no doubt. At the same time there exists, I consider, certain mitigating circumstances, allusions to which have been made in the course of the judgment, which must be considered and given due weight to, in assessing the damages to which the Plaintiff may be held entitled. The claim of the Plaintiff is excessive beyond all bounds. There is no special reason assigned or proved for such a claim, nor indeed is any case made out for damages to the extent of Rs.25,000. Plaintiff was bound to prove his title to such relief. The Plaintiff preferred his claim as a pauper, and it is very questionable whether, had he to pay the costs of such a claim he would not have moderated his demand. So that the amount laid claim to is no criterion of the damages to which Plaintiff may fairly and reasonably be held entitled.

“Considering the Plaintiff’s position at the time of filing the suit, and his station in life prior thereto, which are elements to be considered and weighed, in assessing the damages in a case of this nature, I am of opinion, after a careful consideration of the case in all its bearings, that a sum of Rs.3000, as damages, will meet all the requirements of the case, and at the same time meet the ends of justice.

“In assessing the damages the Court has fully taken into consideration the high standing of General *Tombs*.”

By his decree of the same date in which the Government of *India* was, through some misconception, treated as a co-Defendant, the Judge awarded to the Appellant Rs.3000 as damages, and directed General *Tombs*, as well as the Government of *India*, to pay that sum, and Rs.178 as costs, with interest thereon at 6 per cent. from that date until liquidation, to the Appellant.

In appeal the Commissioner (July 2, 1874) awarded the Appellant a decree for Rs.300, and directed him to pay the Defendant’s costs of Rs.2700, being the difference between the sum decreed in the Lower Court and on the hearing of the appeal.

In his judgment he said: “I do not think it is proved that Plaintiff was at the time restraint was put upon him a dangerous

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lunatic : but it is clear that Defendant believed him to be so, and on the whole I am of opinion that there were sufficient grounds for proceeding under sect. 4 of Act XXXVI. of 1858, which authorizes the apprehension of all persons believed to be dangerous by reason of lunacy," and then proceeded :—

"Under English law a private person may, without any warrant or authority, confine a person disordered in his mind, who seems disposed to do mischief to himself or any other person, the restraint being necessary both for the safety of the lunatic and the preservation of the public peace.

"The police powers of the officer commanding a station are not very clearly defined in Act XXII. of 1864 ; it gives him general control, and empowers him to send any process, requiring immediate service or execution, by any means not immediately at his disposal to the police for execution, under the same rules as processes of the cantonment magistrate, but the deputy inspectors of police can arrest, without warrant, any person believed to be dangerous, by reason of lunacy (*vide* sect. 4, Act XXXVI. of 1858), and I have no doubt that the officer commanding a cantonment has power to order the deputy inspector to make such arrest, and that the deputy-inspector would be bound to obey any such order. Plaintiff alleges the brigade-major did order the deputy-inspector to arrest him, and that he refused, but this officer, *vide* his deposition, denies this, and there is no evidence in support of the allegation. The arrest was purely a police matter, not involving the exercise of any magisterial powers.

"The circumstances attending the arrest are not clearly brought out in evidence; there seems, however, no doubt that, though the police were present, the actual arrest was made by European soldiers, acting independently and not assisting the police officer, as provided by sect. 91 of the Code of Criminal Procedure. It is pleaded (and with truth) that there is nothing unusual in employing unarmed European soldiers to watch Europeans when only native policemen are available, and it is further urged that the employment of Europeans was specially desirable in this case, as the presence of natives was likely to irritate Plaintiff and make him violent.

"It is not alleged that Defendant proceeded under either of the

Acts above cited, or indeed, under any particular law, but it is contended that he felt bound to take immediate steps, himself, in the absence of the cantonment magistrate and the magistrate of the district, and that he acted as a sensible and considerate man, and that subsequent inquiry into the legality of his proceedings shews that they were justifiable by the law.

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"It appears to me that the arrest was not illegal, through the procedure in effecting it was irregular, and, as already noted, it would have been more considerate to have consulted the medical officers before resorting to extreme measures.

"It is necessary here to compare briefly the procedure prescribed by Act XXXVI of 1858 with that actually followed, in respect of Plaintiff.

"The arrest should properly have been made by the deputy inspector, and, if it had been, Plaintiff would have been put in charge of native constables, there being no European police.

"The Act directs that the person arrested shall be brought before a magistrate, who, with the assistance of a medical officer, shall examine him, and if the medical officer shall sign a certificate in the prescribed form, and the magistrate is satisfied, from personal examination or other proof, that such person is a lunatic, and a proper person to be detained under care and treatment, he shall make an order for such lunatic to be received into the asylum, &c.

"Plaintiff was confined in his own house by European soldiers; he was visited, within about half-an-hour by two medical officers, who recorded an opinion that it was necessary for them to have Plaintiff longer under observation before they could make up their minds as to his sanity; the following day they pronounced Plaintiff perfectly sane, but recommended that he should be placed under the surveillance of the civil surgeon. An application was made at once to the deputy commissioner accordingly, but, before his reply had been placed before Defendant, Plaintiff had been taken by his guard before the cantonment magistrate, as above stated; he had then been about fifty-four hours in confinement. No formal certificate, in the form laid down in Act XXXVI of 1858, was drawn out at the time or till after a considerable period. Owing to the conflict of medical opinions, already referred to, it is impossible to give a decided opinion what the result would

J. C. have been if Plaintiff had been examined by a magistrate and the
1882 civil surgeon, in accordance with the provisions of the Act."

SINCLAIR The Judicial Commissioner, on the 17th of November, 1874,
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B R OUGHTON. held that an officer commanding in cantonments is vested within
— cantonments with all the police powers which a magistrate of a
district may exercise within his district ; and that as there was a
duty imposed on the Defendant as officer commanding in canton-
ments, to take action in consequence of his *bona fide* belief that
Plaintiff was dangerous by reason of lunacy, actual or impending,
and that as the action taken was in perfect good faith, and in
performance of the duty thus imposed, the Defendant was not
liable at law for damages in consequence of any wrong that
might have been unintentionally done to Plaintiff."

The material part of his judgment is as follows :—

" There seems to be considerable misapprehension as to the
position of an officer commanding in cantonments, in regard to
the police ; for the Commissioner writes : ' The police powers of
the officers commanding a station are not very clearly defined in
Act XXII of 1864,' and a similar opinion was expressed by the
learned counsel for the Appellant, in addressing me, but in my
opinion the position of the officer commanding admits of no doubt
whatever. He is vested within cantonments with all the police
powers which a magistrate of a district may exercise within his
district. That this is so, is clear from the following examination
of the provisions of Acts XXII of 1864 and V of 1861. By
sect. 11, Act XXII of 1864, the police force employed in any
military cantonment is to be deemed part of the general police
force under the local government in whose territories such
cantonment is situate within the meaning of sect. 2, Act V of
1861, and all the provisions of the said Act shall be applicable to
such force. Had the section ended here, the administration of the
police within a cantonment would have been regulated by sect. 4,
Act V of 1861 ; for by that section the administration of the
police, throughout the local jurisdiction of the magistrate of the
district, is under the general control and direction of such magis-
trate, vested in a district superintendent, &c., and by sect. 4, Act
XXII of 1864, a cantonment is a division of a district with the
meaning and for the purposes of the Code of Criminal Procedure,

But the last sentence of sect. 11, Act XXII of 1864, substitutes the commanding officer of a cantonment for the magistrate of the district as head administrator of the police within the limits of the cantonment. It will be observed that the words used are identical with those used in that part of sect. 4, Act V of 1861, which I have already quoted, the term 'commanding officer of such cantonment' being substituted for 'magistrate of the district.' The sentence runs :—'The administration of the police, within the limits of any cantonment in which there shall be a cantonment magistrate, shall be vested in the district superintendent, subject to the general control and direction of the commanding officer of such cantonment.' Clearly then, an officer commanding a cantonment in which there is a cantonment magistrate, as there is in *Lucknow*, has within the limits of his cantonment all the general police powers conferred by Act V of 1861 on a magistrate of a district ; and, as all the provisions of this Act are declared applicable to the police force in cantonments, the commanding officer is entitled to the benefit of any statutory protection accorded by the Act to members of the police force. It would then, in my opinion, have been a complete and sufficient answer to this suit had the Defendant pleaded the provisions of sect. 42 of Act V of 1861, for the action was brought for a thing done under the general police powers given by the Act, but it was not commenced within three months after the act complained of, nor yet within three months after the Plaintiff had been released from jail, and was at liberty to commence it, nor were the other provisions of the section complied with. On this ground alone, I should feel justified in accepting this appeal and setting aside the decrees of the lower Court, but, as the point was not raised in the lower Courts, nor even in this second appeal to my Court, I prefer to discuss the principle on which the appeal to my Court is mainly based.

"I turn to the ninth plea, which is :—'For that public officers, placed in a position such as that of Sir *Henry Tombs*, ought not to be liable for damages if they only do what a reasonable and prudent man would do for the safety of the public, and particularly when they inflict no actual damage on any individual.' This plea is good. There can be no doubt that if a duty is

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imposed upon a person, the law protects that person in the *bona fide* performance of that duty, and will not permit any one wronged through an error unintentionally committed by such person in the performance of his duty, to recover damages in a Court of law. As pointed out in the arguments addressed to the Court, protection is accorded by the law under certain circumstances, even to private individuals who arrest criminals (and the arrest of criminals and lunatics is analogous), while a much wider protection is afforded to persons making arrests in the performance of a duty imposed upon them. Were this not the case the administration of government would be greatly weakened, if not imperilled. I cannot but think that the Lower Courts, in granting the decrees they did, acted under a misapprehension of the relations subsisting between an officer commanding in cantonments and the police force, and, owing to this misapprehension, they did not fully appreciate the fact that the Defendant, Sir *Henry Tombs*, was bound to take some action for the preservation of the peace in consequence of the eccentric conduct of the Plaintiff. It is immaterial for me to determine whether the course adopted by Sir *Henry Tombs* was the precise course that he ought to have adopted; it is sufficient for me to be satisfied that whatever he did was done in good faith, and that if a wrong was inflicted on the Plaintiff it arose from a mistake. I think it as well, however, to point out that when the Commissioner asserts that the arrest should properly have been made by the deputy inspector, he could scarcely have realized the fact that the officer commanding in cantonments occupies, for police purposes, within the limits of his cantonments, the same position as a magistrate of a district does within his district. The Commissioner will hardly assert that, if it is brought under the personal observation of a magistrate of a district, that there is within his district a person dangerous, by reason of insanity, the magistrate can take no action for the arrest of that person until he can procure the attendance of a deputy inspector of police. It will be seen that I lay great stress on the position occupied by an officer commanding in cantonments towards the police, and I have endeavoured conclusively to shew what that position is. Holding, then, that there was a duty imposed on the Defendants, as officer commanding in canton-

ments, to take action in consequence of his *bona fide* belief that the Plaintiff was dangerous, by reason of lunacy, actual or impending, and that whatever action was taken was taken in perfect good faith, and in performance of the duty thus imposed on him, I am of opinion that the Defendant is not liable at law for damages in consequence of any wrong that may have been unintentionally done to Plaintiff. I am of opinion, therefore, that a verdict should have been given for Defendant, for, as remarked by the *Calcutta High Court* in the case of *Naba Krishna Mookerjee v. The Collector of Hooghly and Another* (1), there is no law in this country that necessarily entitles a Plaintiff to a verdict for nominal damages. In *England*, as a rule, costs follow the verdict; but this is not the case in this country, for by sect. 187, Act VIII of 1859, it is incumbent on the Judge to direct by whom the costs of each party are to be paid. In conclusion, I would observe that this suit should not have been admitted *in forma pauperis*."

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The Appellant appeared in person, and contended that the restraint to which he had been subjected was an illegal restraint, that General *Tombs* was not a judicial officer within the meaning of any Act, that there was no Act which protected him from liability, and that his conduct was not free from malice. The procedure which he adopted was not authorized by any law.

Doyme, and Woodroffe, for the Respondent, contended that the decree of the Judicial Commissioner was right and should be affirmed. All the Courts were agreed that General *Tombs* acted with complete *bona fides*, and the Appellant's present contention that though he began *bona fide*, yet malice arose afterwards or must be inferred from his not attending to the warning of the magistrates, is opposed to those findings. The errors imputed by the first Court to the Defendant were merely *bona fide* errors of procedure. [SIR JOHN MELLOR:—The restraint is the thing to attend to. If that was unlawful, it probably matters not, as regards the cause of action, whether it was inflicted by police or soldiers.] The Commissioner seems to think that the procedure was wrong in sending the soldiers. At all events whatever liability there might be of the Defendant was terminated on the

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Appellant's appearance on the 3rd of November, 1872, before the cantonment magistrate under the process issued by that officer under Act XXV of 1861, sect. 282. The Indian Courts held that the Defendant was in no way responsible for the proceedings taken by the cantonment magistrate. Then it was contended that in directing the apprehension of the Appellant during the absence of the cantonment magistrate, and in keeping him under restraint until he was brought before the cantonment magistrate on his return, the Defendant acted in the exercise of his jurisdiction as commanding officer of the *Lucknow* cantonment. He had police powers: see Reg. III of 1809 and Reg. XX of 1810. [SIR BARNES PEACOCK:—These are *Bengal* regulations; do they apply?] Act XXII of 1864, sects. 11, 12, provide that the police force employed in any military cantonment shall be deemed to be part of the general police force under the local government within whose territory such cantonment is situate, within the meaning of Act V. of 1861. The commandant of a cantonment has a general direction over all the police charged with keeping the peace. When a person says that another is a dangerous lunatic the police officer must exercise an honest discretion as to belief. The officer must believe that he is mad; the officer must be put in motion on grounds that recommend themselves to his own mind. He must have reasonable and probable grounds for that belief: see *Calder v. Halket* (1); *Spooner v. Juddow* (2), decided long before Act XVIII of 1850. Here there was an exercise of discretion, judicial or *quasi* judicial cast upon *Tombs*. [SIR BARNES PEACOCK:—He must either be a judicial officer acting judicially or not. The phrase "*quasi* judicial" would mean nothing more than discretionary]. It is in the nature of a judicial act: see *Kemp v. Neville* (3), for instance, where clearly judicial functions were exercised: see also *Hughes v. Buckland* (4); *Fergusson v. Lord Kin-noul* (5). The Defendant was (a) protected by Act XVIII of 1850; (b) if not he was within the principle of *Spooner v. Juddow* (6).

(1) 2 Moore's Ind. Ap. Ca. 293;
3 Moore's P. C. 28.

(2) 4 Moore's Ind. Ap. Ca. 353.

(3) 10 C. B. (N.S.) 523.

(4) 15 M. & W. 346.

(5) 9 Cl. & F. 251.

(6) 4 Moore's Ind. Ap. Ca. 379.

With regard to the liability of officials, they were not at one time suable in the country but only in the Presidency Courts : *Government v. Brijsoondree Dasee* (1), where it was held that Government officers not coming within the definition of revenue collectors were not responsible to the country Courts. If the Defendant be suable, he is protected as within the principle of *Calder v. Halket* (2). [SIR MONTAGUE E. SMITH:—The principle of that decision is the principle of the construction of 21 Geo. 3, c. 70, and so on in the later cases of the later Acts. Do you bring *Tombs* within the Acts? If not, you must fall back on some principle of common law which protects the exercise of not merely judicial but every discretionary authority.] The principle of law established by the cases cited may be stated thus : where the law imposes upon a public officer a duty which requires the exercise of a discretion, and such officer, in the *bona fide* exercise of such discretion, acts in a mistaken manner so as to cause damage to another, such officer is not responsible therefor even though he be not acting as a judge. To hold otherwise would be to expose an honest officer to consequences which would hamper and impeach the exercise of the very discretion which it was intended to clothe him with. *Tombs* therefore could arrest if he believed the Plaintiff to be a dangerous lunatic. [SIR MONTAGUE E. SMITH :—Again, if the original arrest were justifiable, did he take the proper steps after it? If more than a reasonable time elapsed before he took the Plaintiff before a magistrate, is he protected?] The matter would stand thus : If a public officer is by law bound to discharge public duties for the benefit of the public which require the exercise of judgment and discretion, such officer is *quoad* that duty within the protection of Act XVIII of 1850: *Collector of Hooghly and Others v. Taraknath Mukhopadhyaya* (3); *Chundernarian Singh v. Brijo Bullub Gooyee* (4). The intention with which the act is done is immaterial save as bearing upon the question of *bona fides* : *Lucas v. Nockells* (5); *Ouseley v. Plowden* (6); so that even if General *Tombs* retained

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(1) S. D. A. (1848), p. 456.

(3) 7 Beng. L. R. 449-481.

(2) 2 Moore's Ind. Ap. Cas. 293 ;

(4) 14 Beng. L. R. 254, 257.

3 Moore's P. C. 28.

(5) 10 Bing. 157.

(6) 1 Boulnois, Supreme Court Reports, 145.

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the plaintiff with the view of obtaining a definite medical opinion, and not with the view of handing him over to the magistrate when the latter should return, such intention would not deprive General *Tombs* of any protection which he might have when such intention made, as here, no difference in the actual result to the Appellant, owing to the magistrate's absence. In no sense was the Brigade Major *Beadon* the agent of General *Tombs* except for the purposes of the Acts, nor was *Tombs* liable for his actions. See *Addison* on Torts [3rd ed.], p. 14 ; *Nicholson v. Mounsey* (1).

The Appellant replied.

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The judgment of their Lordships was delivered by

SIR BARNES PEACOCK :—

This is an appeal brought *in forma pauperis* by the Appellant, Mr. *Edward D. Sinclair*, by special leave of Her Majesty in Council, from a judgment of the Judicial Commissioner of *Oudh*, dated the 19th of November, 1874, in a suit brought by the Appellant in the Court of the Civil Judge of *Lucknow* against the late Major-General Sir *Henry Tombs*, and also from a judgment of the Commissioner of *Lucknow* in the same suit.

The suit was commenced as far back as the year 1873, and was for the recovery of damages laid at Rs. 25,000, alleged to have been sustained by the Plaintiff in consequence of the Defendant's having put him under an unlawful arrest of European soldiers of Her Majesty's Royal Artillery, and having wrongfully confined him in his own premises for three successive days, *viz.*, from the 1st to the 3rd of November, 1872, and having caused violence to be used against his person and property. The plaintiff also complained that the Defendant, subsequently to the first step, *viz.*, on Sunday, the 3rd of November, 1872, forcibly delivered the Plaintiff into the custody of the late Lieutenant *Gubbins*, the then cantonment magistrate.

The Defendant, who was the officer in command of the military cantonments in *Lucknow*, put in a written statement, and thereby

alleged that at about 8 A.M. on the 1st of November, 1872, he was riding towards his house in cantonment, when he noticed a flag flying from the thatched roof of a house in which Plaintiff resided, and saw Plaintiff walking about in a very strange and excited manner; that on being informed by Mrs. *Gully* (wife of Captain *Gully*, of the Royal Artillery), who resided in the house opposite that of Plaintiff, that she was alarmed at the conduct of Plaintiff, and on being asked by Mrs. *Gully* for protection against the Plaintiff (Captain *Gully* being absent from the house), Defendant caused due inquiry to be made regarding Plaintiff, and, on information received by him, he directed two medical officers, Doctors *Guthrie* and *Scott*, to examine the Plaintiff as to his soundness of mind; and that the medical officers, on examination of the Plaintiff, considered it necessary to recommend that he should be kept under an European guard until they could form a decided opinion as to his sanity. He further stated that, in the absence of the cantonment magistrate from the station on the 1st and the 2nd November, 1872, Defendant, as officer commanding the cantonments of *Lucknow*, and consequently in general control of the police employed in the military cantonments (see Act XXII. of 1864, s. 11), considered that he was bound and justified, in the interests of public safety, to act on the recommendation of the two medical officers aforesaid, and believing the Plaintiff to be dangerous, by reason of lunacy, actual or impending, placed over Plaintiff a guard of unarmed European soldiers, to prevent him doing harm to himself and others. That the substitution of unarmed European soldiers for native policemen was in accordance with the usual practice, in case of European lunatics, when European policemen are not available.

That on the return of Lieutenant *Gubbins*, the cantonment magistrate, to the station, on the 3rd of November, 1872, the Plaintiff was made over in due course to the said magistrate (sect. 4, Act XXXVI. of 1858), to be dealt with according to law, and that Defendant was in no way concerned, nor could he be held responsible for any proceedings that might have taken place in the Court of the cantonment magistrate, or subsequently.

That Defendant acted throughout in perfect good faith, and in

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J. C. the interests of public safety, and that no violence was used by
1882 the Defendant's order, or at his request.

SINCLAIR That the amount of damages claimed by the Plaintiff was
v. excessive, with reference both to the Plaintiff's late position in
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The case was tried in the first instance by the Civil Judge of *Lucknow*, who gave judgment for the Plaintiff, and assessed the damages at Rs.3000.

From that decree the Defendant appealed to the Commissioner of *Lucknow*, who upheld the decision, but reduced the damages to Rs.300, and ordered the Plaintiff to pay the Defendant's costs on Rs.2700, the difference between the Rs.300 and the sum awarded by the Civil Judge.

It appears that, on the morning of the 1st of November, 1872, the Defendant, who was then the commanding officer of the cantonment at *Lucknow*, having reason to believe that the Plaintiff was a dangerous lunatic, caused him to be confined on his own premises under a guard of unarmed European soldiers of Her Majesty's Royal Artillery, and caused him to be soon afterwards visited and inspected against his will by Drs. *Guthrie* and *Scott*, in order to ascertain the state of his mind. Those gentlemen on the same day reported that, having carefully examined the Plaintiff, they did not consider themselves justified in giving a decided opinion on the case until it had been longer under their observation, and that they considered it necessary to recommend that the Plaintiff should be kept under a European guard until the case should be decided on. The Defendant in his written statement admits that he felt himself bound, in the absence of the cantonment magistrate, to act upon the recommendation of the medical officers, though he there states his case as if the recommendation had preceded the confinement, which was not the fact. However, the Plaintiff was kept under confinement from the 1st to the 3rd of the month, and the medical officers were ordered to visit him during his confinement, and did so against his will.

The Defendant signed on the report a memorandum as follows:—

“ Mr. *Sinclair* is a civilian, not belonging to the cantonments, and it is hard on the troops to have to furnish a guard over him.

I hope, therefore, Drs. *Guthrie* and *Scott* will not be long in making up their minds.

"I believe Mr. *Sinclair*'s late chum, 'Mr. *Reid*,' could prove the insanity at once.

"Dr. *Cannon* is quite willing to receive him, and it is my opinion then that he should be observed before being sent to *Bhowanipoor* and not in cantonments.

"Make the substance of this known to Dr. *Guthrie*.

"Mr. *Sinclair* must be subsisted by the cantonment magistrate."

It is clear that the district magistrate, or the officer exercising the powers of the district magistrate, would have had jurisdiction in the case if the Plaintiff had been taken before him under Act XXXVI. of 1858, sect. 4. It is clear, however, from the memorandum signed by the Defendant, that he intended to keep the Plaintiff under the European guard until the medical officers could decide on the case, a detention which he was not authorized to inflict.

The report of the medical officers, with the memorandum thereon signed by the Defendant, was delivered to Captain *Beadon*, the brigade major, and on the following day, Saturday, the 2nd of November, Drs. *Guthrie* and *Scott* forwarded a further report to the effect that they considered the Plaintiff perfectly sane, but that they recommended him to be placed under the observation of the civil surgeon. This recommendation, it must be observed, was quite in accordance with the opinion of the Defendant expressed in the memorandum of the first report of which he directed that the substance should be made known to Dr. *Guthrie*. The certificate is, unfortunately, not forthcoming, and has not been accounted for, but it appears from the evidence of Major *Beadon*, the brigade major, that he forwarded it on the 2nd to the Officiating Deputy Commissioner, with a docket, which was in the following terms:—

"No. 4071. *Lucknow* Brigade Office, 2nd November, 1872.

"Forwards medical certificate regarding Mr. *Sinclair*'s state of mind, and to request that very early steps may be taken to remove him to the charge of civil surgeon.

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“ Mr. *Sinclair* is at present under restraint and in charge of a military guard.

(Sd.) “ R. BEADON, Captain, Brigade Major.

“ To the Officiating Deputy Commissioner, *Lucknow*.”

In answer to that request Major *Beadon* received from the Deputy Commissioner the following communication :—

“ No. 4928. 2nd November, 1872.

“ To the Brigade Major, *Lucknow*.

“ Sir,—In reply to your memorandum, No. 4071, dated 2nd instant, I have the honour to state that, the medical officers who have examined Mr. *Sinclair* having reported him to be perfectly sane, I should not be justified in placing him under restraint, or under observation, against his will, of the civil surgeon. The law relating to lunatics is clear on this point, that a magistrate has no power to act against any person (under Act XXXVI. of 1858), unless that person has been declared by medical authority lunatic.

“ 2. I therefore regret that I cannot comply with your request to move Mr. *Sinclair* to the charge of the civil ‘surgeon.’

“ 4. The cantonment magistrate will be directed to give attention to Mr. *Sinclair*’s proceedings, and, should occasion require, to bind him over to keep the peace, and consign him to custody should sureties not be forthcoming.

“ I have, &c.,

(Sd.) “ R. H. DE MONTMORENCY,

“ Officiating Deputy Commissioner.”

“ No. 4929. 2nd November, 1872.

“ Copy of the foregoing forwarded to the cantonment magistrate, *Lucknow*, for compliance with reference to the last paragraph.

(Sd.) “ J. H. PHILLIPS, Head Assistant for

“ R. H. DE MONTMORENCY,

“ Officiating Deputy Commissioner.”

Major *Beadon* states his belief that he received that communication on Sunday, the 3rd of November, about 11 o’clock, but that, as he never did business on Sunday, he did not shew the letter to the Defendant on that day, but did so on the following Monday.

The Plaintiff was not released from confinement either on the second report of the medical officers received by Major *Beadon* on the Saturday or on the receipt of the letter from the Deputy Commissioner, at about 11 o'clock on the Sunday. On that day, however, a summons was issued by the cantonment magistrate directed to the Plaintiff requiring him to appear at one o'clock on that day, to enter into his personal recognizance in Rs. 500, and two sureties in Rs. 250 each, to keep the peace for six months. That summons was delivered to and treated as a warrant by Major *Beadon*, who forwarded it on the same day to the officer commanding the Royal Artillery, with a letter, of which the following is a copy:—

“Memorandum, No. Urgent.

“From the Brigade Major to the Officer commanding Royal Artillery. *Lucknow*, 3rd Nov. 1872.

“Has the honour to request that Mr. *Sinclair*, at present under a guard of the R.A., may be taken at once before the cantonment magistrate, in accordance with the inclosed warrant, when further orders will be given to the N. C. officer in charge as to his disposal.

(Sd.) “*RICHARD BEADON*, Captain, Brigade Major.”

The Plaintiff was accordingly detained in confinement in his own house until about two or three o'clock in the afternoon, when he was taken by the European guard against his will before the cantonment magistrate, not to be dealt with as a dangerous lunatic, but in consequence of the summons, and was committed for want of bail. Subsequently the Colonel commanding the European Artillery addressed the following letter to the Defendant:—

“*Lucknow*, 3rd November, 1872.

“Has the honour to report, for the information of the Major-General commanding, that Mr. *Sinclair* has been removed to the magistrate's office, as herein directed, but considerable delay has taken place in doing this, owing to Mr. *Sinclair* refusing to be removed, and refusing to put on his clothes.

“The bungalow in which Mr. *Sinclair* resided is not in charge of any servant, and there are several articles of his property there.

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A gunner has been left to the care of these things, as also two ponies supposed to be Mr. *Sinclair's*, till further orders are received as to their disposal.

(Sd.) "NEIL MACKAY, Colonel,
"Commanding R.A., Oude Division."

It was contended by the Defendant in his written statement that he was not liable for the detention of the Plaintiff after he was made over to the cantonment magistrate, and the first two Courts very properly adopted that view. It does not appear, however, upon whose information and complaint the summons was obtained, and their Lordships cannot help remarking upon the great irregularity of the forcible execution of it as if it were a warrant. The Defendant, however, is not liable for any force used in compelling the Plaintiff to go before the magistrate.

Their Lordships must also point out that Colonel *J. Reid*, the Commissioner, in his judgment, has referred to several matters which do not appear in evidence. Their Lordships have, however, entirely rejected those statements from their consideration, and have not been in any manner influenced by them.

Sir *Henry Tombs* having died, the Administrator General of *Bengal*, as administrator of his estate, appealed to the Judicial Commissioner of *Oudh*, who, on the 17th of November, 1874, held that an officer commanding in cantonments is vested within cantonments with all the police powers which a magistrate of a district may exercise within his district, and that as there was a duty imposed on the Defendant, as officer commanding in cantonments, to take action in consequence of his *bona fide* belief that Plaintiff was dangerous by reason of lunacy, actual or impending, and that as the action taken was in perfect good faith, and in performance of the duty thus imposed, the Defendant was not liable at law for damages in consequence of any wrong that might have been unintentionally done to Plaintiff.

It may be taken as a fact upon the evidence and upon the findings both of the Civil Judge and of the Commissioner that the Plaintiff was not, at the time when the acts complained of were committed, a dangerous lunatic. At the same time, there can be no doubt that the Defendant acted *bona fide* in the discharge of a

public duty, and under the belief that the Plaintiff was dangerous by reason of lunacy.

That belief might have justified the Defendant, who as commanding officer of the cantonment had the control and direction of the police, in directing proceedings to be taken by the police under the 4th section of Act XXXVI. of 1858, but it is clear that the Defendant did not proceed, or intend to proceed, under that Act.

The Commissioner in his judgment, referring to Acts XXII. of 1864 and XXXVI. of 1858, says :—

“ It is not alleged that the Defendant proceeded under either of the Acts above cited, or, indeed, under any particular law, but it is contended that he felt bound to take immediate steps himself, in the absence of the cantonment magistrate and the magistrate of the district, and that he acted as a sensible and considerate man, and that subsequent inquiry into the legality of his proceedings shews that they were justifiable by the law.”

The Legislature has been careful in providing for the protection of lunatics, and it would be extremely dangerous if the doctrine enunciated by the Judicial Commissioner could be held to be law. He draws no distinction between a mistake in fact and a mistake in law, if *bona fide*. He says, “ The main point raised in the appeal to this Court is one of principle namely, when a public officer, who is bound by his duty to take some action, fully intending in good faith to do what is right, makes a mistake and causes wrong, is such officer liable to be mulcted in damages by a Civil Court ?” And he held that he is not. Again, he says, “ Holding, then, that there was a duty imposed on the Defendant, as the officer commanding in cantonments, to take action, in consequence of his *bona fide* belief that the Plaintiff was dangerous by reason of lunacy, actual or impending, and that whatever action was taken was taken in perfect good faith, and in performance of the duty thus imposed upon him, I am of opinion that the Defendant was not liable at law for damages in consequence of any wrong that may have been unintentionally done to the Plaintiff. I am of opinion, therefore, that a verdict should have been given for the Defendant.”

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There is no law which authorizes the police or a magistrate in the exercise of police duties, or an officer in command of a cantonment, in consequence of a *bona fide* belief that a person is dangerous by reason of actual lunacy, to put him into confinement in order that he may be visited and examined by medical officers, and to keep him in confinement until such officers can feel themselves justified in reporting whether the person is a dangerous lunatic or not; *a fortiori*, this cannot be done in the case of a *bona fide* belief of danger from impending lunacy. The Defendant had no authority for causing the Plaintiff to be put under restraint for such a purpose, nor had he, after the report of the medical officers that the Plaintiff was perfectly sane, any colour of authority for keeping him under restraint in order that he might be removed from the cantonment and placed under the observation of the civil surgeon, even though recommended so to do by the medical officers.

Neither the police nor a magistrate in the exercise of police duties could, under Act XXXVI. of 1858, have had any colour for doing that which the Defendant caused to be done.

The Appellant appeared in person, and argued his case with considerable ability.

The Respondent appeared by counsel, who, amongst other arguments, contended that the Defendant was protected by Act XVIII. of 1850. But there is no foundation for that contention. That Act was for the protection of judicial officers acting judicially and officers acting under their orders. It is clear that the Defendant was not a judicial officer, and that he did not act judicially. Mr. *Woodroffe*, one of the learned counsel for the Defendant, cited many authorities, and amongst others, *Calder v. Halket* (1), *Spooner v. Juddow* (2), *Hughes v. Buckland* (3), and *Fergusson v. Lord Kinnoul* (4), but none of those authorities have any bearing upon the present case. He also referred to *Lucas and Nockels* (5), but there is a great distinction between that case and the present.

The Plaintiff has complained before their Lordships that he was not allowed by the Civil Judge to give his own evidence-in-chief

(1) 3 Moore's P. C. 28 ; 2 Moore's Ind. Ap. Ca. 293.

(2) 4 Moore's Ind. Ap. Ca. 353.

(3) 15 M. & W. 346.

(4) 9 Cl. & F. 251, 290.

(5) 10 Bing. 157.

on his own behalf, and that he was merely examined in the nature of cross-examination on behalf of the Defendant. It does not appear that the Judge refused to allow the Plaintiff to give evidence as a witness for himself ; but, assuming that the Plaintiff is correct in his statement, the fact would be merely a ground of appeal from the Civil Judge, and such appeal is expressly excluded from the leave given by the order of Her Majesty in Council.

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The Plaintiff is entitled to a decree, and the only question remaining is as to the amount of damages to which he is entitled. Their Lordships see no sufficient reason to alter the judgment of the Commissioner of *Lucknow* in that respect. They will, therefore, humbly advise Her Majesty to reverse the decree of the Judicial Commissioner, and also to reverse the judgment of the Commissioner of *Lucknow* as regards the order that the Plaintiff shall pay the costs on Rs.2700, being the difference between the Rs. 3000 awarded by the First Court and the Rs.300 awarded by the Commissioner, but to affirm the last-mentioned judgment in other respects. The Respondents must pay the costs of this appeal.

Appellant in person.

Solicitor for the Respondents : *H. Treasure.*

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 May 18. RAJAH NILMONI SINGH DEO BAHADOOR APPELLANT
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 TARANATH MOOKERJEE RESPONDENT.

ON APPEAL FROM THE HIGH COURT AT BENGAL.

Jurisdiction of Rent Courts—Transfer of Rent Decrees into another District for execution.

The Rent Courts established by Act X. of 1859 are Civil Courts within the meaning of Act VIII. of 1859, and under sect. 284 of Act VIII. a Collector can transfer his rent decrees for execution into another district.

APPEAL from an order of the High Court (July 7, 1880), made in exercise of its power of superintendence over inferior Courts, given by 24 and 25 Vict. c. 104, s. 15. It substantially set aside certain orders (March 11, 1872, and May 27, 1879), of the Deputy Commissioner of *Manbhoom*, transferring his own decrees made under the *Rent Act* (X. of 1859) to other districts for execution.

The grounds on which the High Court exercised its extraordinary jurisdiction were that the decrees in question were decrees of a Revenue Court, and that the Deputy Commissioner of *Manbhoom* had no authority under any law applicable to rent suits in that district to make the order in question.

The judgment of the High Court (*Romes Chunder Mitter and Maclean, JJ.*), was as follows:—

“If the orders complained of are passed without jurisdiction, we think we have the power to interfere under sect. 15 of the Act of Parliament constituting this Court (1).

“We are also of opinion that a Revenue Court under Act X. of 1859 has no power to transfer a decree of its own to be executed by another Court within the jurisdiction of the latter. Such power cannot exist without an express provision of the law granting it.

* *Present* :—SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

(1) *Vide Gobind Coomar Chowdhry v. Kisto Coomar Chowdhry*, 7 *Suth W. R.* 520.

It is clear, therefore, that both the orders complained of are such as the Deputy Commissioner of *Manbhoom* had no authority to pass under Act X. of 1859, or any other law applicable to rent suits in that district.

"But one of the orders was passed so far back as the 11th of March, 1872, and we understand that sales and other proceedings have been held and completed under it without any objection on the part of the applicant. Under these circumstances, we do not think it right, in the exercise of our extraordinary power under sect. 15 of the statute referred to above, to quash it now.

"The other order complained of is comparatively of a recent date, viz., the 27th of May, 1879, and from the time the petitioner came to know of it, he has been diligently endeavouring to have it set aside. Besides, if proceedings be allowed to proceed in accordance with it, it may unnecessarily involve the parties to this suit (and possibly also third parties) in profitless litigation. Under these circumstances, we think it right to exercise our extraordinary jurisdiction in respect of this order. We accordingly set it aside, and direct the Deputy Commissioner to recall the certificates of non-satisfaction from the district Courts to which they have been sent, informing them at the same time that the order under which they were sent has been reversed.

"We are informed by the parties that proceedings are still pending in the District Court of *Nuddea* under the first-mentioned order. Although we decline to quash it formally on the grounds mentioned above, we have yet expressed our opinion that it was also *ultra vires*. We think, therefore, that the District Court of *Nuddea* should be informed that it should not proceed further in the matter, and return the record back to the Court of the Deputy Commissioner of *Manbhoom*.

"Under these circumstances we think each party should bear his own costs in this rule, which we make absolute in the terms set forth above."

Doyne, for the Appellant, contended that under Act X. of 1859, s. 151, the High Court had no power to set aside the order of the Deputy Commissioner. And as regards the power of superintendence under the *Charter Act* (24 & 25 Vict. c. 104), the Deputy

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Commissioner was within his jurisdiction and authority in making the orders complained of. Prior to Act X. of 1859 such jurisdiction could not be questioned. At that time regular suits for arrears of rent were brought before the ordinary Civil Courts : see Reg. V. of 1831, repealed by Act X. of 1859. See also as to the power of transfer for execution Act XXXIII. of 1852, ss. 1-7 and 11 ; amended in certain respects immaterial to the present question by Act XXXIV. of 1855, and substantially repealed by the *Civil Procedure Code*, 1877. The question is did Act X. of 1859, or any subsequent Act take away that power of transfer as regards rent decrees. It is erroneously assumed by the Respondent and the High Court that the provisions of Act VIII. of 1859 for transmission of decree for execution (sect. 284, &c.), have no application to rent suits. But Act VIII. passed on the 22nd of March, 1859, was extended by proclamation to the district of *Manbhoom* in June, 1859 ; and even if that Act did not apply Act XXXIII. of 1852 at least was applicable to decrees for rent. Act X. came into force on the 1st of August, 1859, as regards *Manbhoom*. Rent suits were to be instituted before the Collector, and the decrees were to be executed by the Revenue Courts within their local jurisdiction. No provision was made for execution of such decrees out of the local jurisdiction. External executions continued to be governed by Act XXXIII. of 1852, and sect. 23 of Act X. of 1859 did not take away the powers conferred by the former Act. The intention of Act X. was to give exclusive jurisdiction to Collectors, but as the execution of a decree was not the trial of a suit, it was not interfered with. Act X. of 1877 repealed Act XXXIII. of 1852, but (see sect. 223) renewed the provisions as to transfer of decrees for execution to another jurisdiction.

Leith, Q.C., and *Cowie*, Q.C. (*C. W. Arathoon* with them), for the Respondent, contended that the order of the High Court was right. The earliest Regulation on the subject was Reg. I. of 1799. They contended that the legislation referred to did not intend to give the powers of transfer beyond the local jurisdiction of the officer charged to try the rent suits. No such power was expressly conferred, and could not be assumed. As regards Act VIII., the expression " Civil Courts " does not includ

the Revenue Courts. These latter Courts have special powers under sect. 92 of Act X. and the sections of Act VIII., which were intended to apply to them, were incorporated into Act X. itself, excluding the section under which a power to transfer is claimed. [SIR BARNES PEACOCK :—See sect. 284 of Act VIII.] The Court in question was not then in existence. Act VIII. would only apply to Courts in existence when it became law. [SIR BARNES PEACOCK :—See sect. 6.] Two different procedures are provided, that of Act VIII. applies to Civil Courts, that of Act X. to Revenue Courts. The latter Act incorporates certain specific sections of the former, and thereby impliedly excludes those not so incorporated—the intention being that each Act should be complete in itself. Reference was made to sect. 67 of Act X. of 1859, also to sects. 122 and 132. In regard to the suits now in question Act X. of 1877 has no application.

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The Appellant's counsel was not called on to reply.

The judgment of their Lordships was delivered by

SIR ARTHUR HOBHOUSE :—

The question presented to their Lordships in this appeal is, whether the Deputy Commissioner of *Manbhoom* who has made decrees in rent suits under the *Bengal Rent Act*, No. X. of 1859, can transfer those decrees for execution into another district. That officer possesses the jurisdiction conferred on Collectors of land revenue, and having made decrees in exercise of such jurisdiction has further proceeded to make two orders transferring two decrees and execution. The High Court, in the exercise of their power of revision, have substantially quashed his orders; in point of form, they have quashed one of the orders and they have stayed proceedings on another. It is hardly necessary to enter into the details of the litigation. The High Court have decided that the Deputy Commissioner, as Judge of the Rent Court of *Manbhoom*, had no authority to pass the orders under Act X. of 1859, or any other law applicable to rent suits in that district.

A question was raised with respect to the jurisdiction of the High Court to entertain this question in revision at all. Their

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Lordships do not think it necessary to say anything upon that point, except that they entirely agree with the view taken by the High Court of their own jurisdiction.

The other question depends upon the construction Act X. of 1859. That Act was passed for the purpose, among other things, of transferring suits for arrears of rent to the jurisdiction of the collectors of land revenue; and it provided by sect. 23, paras. 4 and 7, that all such suits "shall be cognizable by the collectors of land revenue, and shall be instituted and tried under the provisions of that Act, and, except in the way of appeal, as provided in this Act, should not be cognizable in any other Court or by any other officer, or in any other manner."

It is not contended on behalf of the Appellant that Act X. of 1859 in any express way gave to the collector the power of transfer which has been exercised. Neither is it contended for the Respondent that the words which have been read would, without more, prevent the provisions of Act VIII. of the same year from applying to the execution of a collector's decrees beyond the jurisdiction of his Court. The contention of the Respondent is, that there is something in the language of Act X. of 1859 which excludes this power from the jurisdiction of the collector sitting as the Judge of the Rent Court established by that Act. For that purpose the Respondent's counsel referred to a number of sections which may be illustrated by a single one. Sect. 77 deals with cases in which a third party appears to claim title in a rent suit; it gives the collector certain powers of deciding the question before him, and then contains this proviso:—"The decision of the collector shall not affect the right of either party who may have a legal title to the rent of such land or tenure to establish his title by suit in Civil Court." There are a number of other sections of similar frame; and the contention is, that the expression "Civil Court" is used in all those sections in such a way as to shew that the framers of the Act X. of 1859 did not consider that the Rent Courts established by that Act are Civil Courts.

It must be allowed that in those sections there is a certain distinction between the Civil Courts there spoken of and the Rent Courts established by the Act, and that the Civil Courts referred to in sect. 77, and the kindred sections mean Civil

Courts exercising all the powers of Civil Courts, as distinguished from the Rent Courts which only exercise powers over suits of a limited class. In that sense there is a distinction between the terms; but it is entirely another question whether the Rent Court does not remain a Civil Court in the sense that it is deciding on purely civil questions between persons seeking their civil rights, and whether being a Civil Court in that sense, it does not fall within the provisions of Act VIII. of 1859. It is hardly necessary to refer to those provisions in detail, because there is no dispute but that, if the Rent Court is a Civil Court within Act VIII. of 1859, the collector has under sect. 284, the power of transferring his decrees for execution into another district.

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The consequence of holding as the High Court have held is, that wherever Act X. of 1859 applies, persons seeking their rent against a tenant who is insolvent in the district in which he is sued have absolutely no remedy against him, though he may be possessed of great wealth in another district. No reason has been assigned, or so much as suggested, why such a distinction should exist between a person who is claiming a debt founded on rent and a person who is claiming a debt founded on any other transaction. The distinction does not exist in any other part of *India*, neither indeed does it exist in those provinces of *Bengal* in which Act X. of 1859 has been repealed, and the *Bengal* Act VIII. of 1869 has taken its place. Therefore although it is not impossible that the Legislature should have intended to establish in *Manbhoom* and adjacent districts a distinction between claims for rent and all other claims which does not exist elsewhere, it requires very clear and cogent evidence on the face of the enactments, to support the conclusion that they really do intend such a distinction.

That consideration is somewhat emphasised by referring to Act XXXIII. of 1852, which was an Act passed to facilitate the enforcement of judgments in places beyond the jurisdiction of the Courts pronouncing the same. It provides that with respect to all Courts—not making a distinction between one Court and another, but with respect to all Courts,—judgments may be enforced in the manner provided in the Act, viz., by a transfer of

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the judgment out of the district of the Judge who pronounces it into the district of some other judge within whose jurisdiction the debtor possesses property. It is true that in this Act it is said that the word " judgment " means a judgment in a civil suit or proceeding. But suits for the recovery of rent are civil suits or proceedings ; and nothing can be clearer on the face of this Act than that the Legislature intended that everybody who obtained a decree in a Court of justice should have a remedy against his debtor, wherever the property of that debtor might be.

The provisions of the Act of 1852 are substantially repeated in Act VIII. of 1859 ; and though that Act speaks of Civil Courts, and not all Courts as Act XXXIII. of 1852 does, yet the intention expressed is the same, viz., that all Courts entertaining civil suits of any kind should have this power of transferring their decrees for execution into another district. We find that Act XXXIII. of 1852 was repealed in the year 1861, and it is repealed as being simply obsolete, the only reason expressed for repealing it being that Act VIII. of 1859 had been passed. If Act VIII. of 1859 covered the same ground as Act XXXIII. of 1852, the earlier Act had become useless and might be swept out of the Statute Book. But the earlier Act would not have become useless unless the later Act covered the same ground.

In the opinion of their Lordships it is clear that, looking outside Act X. of 1859, no intention of making a distinction between rent suits and other suits in respect to the point now under consideration can be ascribed to the Legislature.

Turning to Act X. of 1859, the preamble recites that " it is expedient to re-enact, with certain modifications, the provisions of the existing law in connection with demands of rent, to extend the jurisdiction of collectors, and to prescribe rules for the trial of such questions." It was pointed out by Mr. *Doyne* that the particular process now under consideration was not the trial of any question regarding rent. But when we look at the provisions of the Act, it is clear that they go beyond the trial of such questions, and provide for the execution of decrees. At the same time the scope of the Act appears to be only to provide for the execution of the decrees of the collector within his jurisdiction. There is nothing in the Act which provides for any execution.

beyond his jurisdiction. And there is nothing to forbid the conclusion that such executions are left to the operation of Act XXXIII. of 1852, or the corresponding portion of Act VIII. of 1859.

Sect. 160 of Act X. of 1859 has a bearing on this question. That section provides that an appeal from the judgment of a collector or deputy collector shall lie to the zillah Judge. But the zillah Judge is a Civil Court to all intents and purposes. It was not disputed that if an appeal went from the collector to the higher Court,—to the zillah Judge or to the High Court,—and the decree of the collector for rent was there affirmed, it would become the decree of a Civil Court, which could not be excluded from the operation of Act VIII. of 1859. Then this consequence would follow, that the act of the parties would alter the nature of the decree ; as long as the decree remains the decree of the collector it is incapable of enforcement in any other district ; but let the decree be affirmed by a Court of Appeal, and, though it is between the same parties for the same subject-matter, it then becomes enforceable in another district. It is very difficult to suppose that any such result as that could possibly have been intended by the Legislature.

∴ These considerations lead to the conclusion that the Rent Courts established by Act X. of 1859 must be held to fall within sect. 284 of Act VIII. of the same year.

The result is that their Lordships will humbly advise Her Majesty that the order of the High Court of the 7th of July, 1880, be set aside, and that it be ordered that the rule *nisi* of the 17th of May, 1880, therein referred to be discharged with costs. The Respondent must pay the costs of the appeal.

Solicitors for Appellant : *Lambert, Petch, & Shakespear.*

Solicitor for Respondent : *T. L. Wilson.*

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RAI BALKRISHNA PLAINTIFF ;

AND

MUSSUMAT MASUMA BIBI, MUSSUMAT
SAID-UN-NISSA BIBI, NAWAB MOHA-
MED HOSEIN KHAN, AND THE COL-
LECTOR OF GHAZIPUR ON BEHALF OF
THE COURT OF WARDS DEFENDANTS.

TWO CONSOLIDATED APPEALS.

[ON APPEAL FROM THE HIGH COURT IN THE NORTH-WESTERN
PROVINCES.]

*Reg. LII. of 1803—Court of Wards—Incompetency of Ward to contract—Hold-
ing out by the Court of its Ward as competent.*

Where an estate has been properly taken possession of by the Court of Wards under a proper power on behalf of its ward, the latter is incompetent to bind the same by debts or alienation thereof.

Mohummud Zahoor Ali Khan v. Mussumat Thakooranee Rutta Koer (1) distinguished.

Where the said Court has given to its wards, whether prudently or not, a limited authority to raise loans for the purpose of paying antecedent debts, *held*, that that is not such a holding out to the world of the competency of such wards as would induce any reasonable person to suppose that they had power to contract debts.

CONSOLIDATED appeals from two decrees of the High Court (May 26, 1879) whereby two decrees of the District Judge of *Benares* (21st and 25th September, 1878) were affirmed.

The Appellant was Plaintiff, and the above-named Respondents were Defendants in each of the suits; the three first named being made Defendants as having executed the mortgages on which the Appellant sued, the fourth being made Defendant as representing the Court of Wards which had assumed, in manner hereinafter mentioned, the management of the mortgaged estate.

Both Courts concurred in holding that the mortgaged estates

**Present* :—SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

(the date of the mortgage deeds being Nov. 1, 1872, and March 7, 1874) belonged solely to the Respondent *Masuma Bibi*, and that as that estate was, at the date of the mortgages, under the management of the Court of Wards (and had been so since May, 1869) she, *Massuma Bibi* was incompetent to bind herself or her estate by those deeds. In the first of the two appeals both Courts were also of opinion that the sale in execution to the Appellant of the interest of the original mortgagee was bad for irregularity under the provisions of Act VIII. of 1859, sect. 249, relating to a sale in execution of a decree for immovable property.

The facts of the case appear in the judgment of their Lordships.

The Judge of *Benares* in giving judgment referred for his reasons to a former judgment delivered by him in an analogous case, in which, after giving a history of the family from the grant of the talook to 1868, narrating the assumption of the management by the Court of Wards, the contracting of the various debts by *Masuma Bibi* and her family, he referred to the various regulations and Acts relating to the Court of Wards. That is to say, he referred to Act XIX. of 1873, sects. 193, &c., and to Reg. LII. of 1803 ; and also to *Mohummud Zahoor Ali Khan v. Mussumat Thakooranee Rutta Koer* (1). He then proceeded as follows :—

“The *Sunwani* estate was in 1869, at the urgent representation of its proprietress, at the recommendation of the Collector, Commissioner, and Board of Revenue, and with the sanction of the Lieutenant-Governor, placed under the superintendence of the Court of Wards, and *Mussumat Masuma Bibi* thus became a disqualified proprietress. She was well aware what the effect of compliance with her entreaties would be, for, in her petition of the 22nd of February, 1869, she prayed that the Court of Wards would take over charge of her estate, clear it of debts, and thus save it from falling into other hands ; and she promised that if her prayer were granted she would in future never do anything without the order of the Court of Wards.

“It is on all hands admitted that the estate was only brought under the superintendence of the Court of Wards in 1869, and it

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has thus continued up to the present date, and with reference to the law and to the ruling above noticed, I find that *Mussumat Masuma Bibi*, being a disqualified proprietress, was of herself incompetent to alienate or encumber her estate so long as it was under the superintendence of the Court of Wards."

And, further, he held in effect that, though the revenue authorities had known of and sanctioned the obtaining of funds by *Masuma* and her family to pay off a particular debt, they did not give permission to execute the mortgage to the Plaintiff in question in that suit by which money was raised to pay off that debt.

The High Court affirmed the judgment of the lower Court as "right and sound."

Leith, Q.C., and *Doyne*, for the Appellant, contended that it had not been shewn that the *Sunwani* estate had been duly and legally brought under the Court of Wards, either in its ordinary or extraordinary jurisdiction. *Mussumat Bibi* was a granddaughter of the grantee of the talook, and under Mohammedan law was absolutely entitled. She was, therefore, competent to bind the estate, and did bind it by the mortgages in question. The mere fact that the Court of Wards had taken possession of her estate did not incapacitate her for contracting or alienating. The disqualification must be shewn under the Regulation. The law which governs these suits is Reg. LII. of 1803, which was extended to *Benares*, where the mortgaged lands are situated, by Reg. VI. of 1822. It was a re-enactment, in many of its sections, of Reg. X. of 1793, Sect. 7, however, makes an important addition. Reg. X. of 1793 contemplated the assumption of management by the Court of Wards only of revenue-paying estates, the proprietors of which should fall within some one or more of the disqualifications described by the rules for the decennial settlements : see sects. 1, 2, and 3.

Reg. LII. of 1803, though somewhat different (see preamble), contemplated the same thing. [Reference was then made to sects. 2, 3, 4 and 7, of the latter Regulation.] No distinction was drawn by the Courts below between the ordinary jurisdiction of the Court of Wards defined by the first three of those sections,

and the extraordinary jurisdiction defined by sect. 7, which extended it under the circumstances mentioned therein to cases of revenue-paying lands acquired by a disqualified proprietor otherwise than by inheritance, and also to non-revenue-paying estates of disqualified proprietors. It was submitted that these cases could not, upon the undisputed facts, possibly be brought within the ordinary jurisdiction: and further, that no sufficient foundation has been laid for the extraordinary jurisdiction. The case of *Mohummud Zahoor Ali Khan v. Mussumat Thakooranee Rutta Koer* (1) is in several passages opposed to the conclusion at which the Judge arrived, and related wholly to the ordinary jurisdiction.

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As regards the question decided in the first appeal only, viz., that the sale in execution was illegal, sect. 249, Act VIII. of 1859, not having been complied with in regard to the affixing of the written notification and the expiration of thirty days before the sale, and execution having been sued out in *Benares* instead of *Ghazipur*, where the land lay: it was contended that that question ought to have been raised by a distinct allegation and issue. Even if a sale of a mortgage security on land is an interest in land, yet no objection to the alleged irregularity was made by the judgment debtor, who was alone competent to make it, and the sale consequently became irreversible under sect. 252, 256, 257. But in point of law a sale of a mortgage security not yet due is but the sale of a debt with a future and contingent right of enforcing the same against the land, and is not the sale of such a "right or interest in land" as is contemplated by sect. 249: see *Shamsunder Das v. Rohun Buksh* (2). See also *Mussumat Bhawani Kuar v. Gulab Rai* (3).

SIR ROBERT P. COLLIER:—Their Lordships only desire to hear counsel for the Respondent on the following points: (1.) Whether the Court of Wards assumed the possession and management under sect. 7 of Reg. LII. of 1803. (2.) Whether the acts of the Court were done irregularly.

Cowie, Q.C., and Woodroffe, for the Respondent, the Collector of

(1) 11 Moore's Ind. Ap. Ca. 468.

(2) 6 N. W. H. C. R. 252.

(3) Ind. L. R. 1 Allah. 348.

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Ghazipur, contended that there was no distinction taken in the Courts below between the revenue-paying and non-revenue-paying lands, and that the whole talook had been taken in charge by the Court of Wards under Reg. LII. of 1803. The evidence shewed that the charge of the *Masuma Bibi's* estates was validly committed to the Court under the orders of the Government at her own request, and on the ground of her incompetence to manage and protect them. She was found by both Courts to be legally disqualified to contract debts or to alienate the estates. And the evidence shews that the Appellant had full notice of that disqualification. The case in 11th *Moore* is distinguishable from this, for there the Court of Wards treated the owner as competent and had intended, but for the Mutiny intervening, to transfer the estate to her. The incompetent ward, on whose behalf possession had originally been taken, was dead, the Court continued to hold on behalf of a female who was competent, and who had acquired title by inheritance, and it was held that mere possession by the Court did not invalidate her acts. The Court declined the management.

Leith, Q.C., replied.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER :—

Two suits have been here consolidated, brought by *Rai Bal-krishna* against *Mussumat Masuma Bibi*, her daughter, her daughter's husband, and the Collector of *Ghazipur* on behalf of the Court of Wards.

The plaint in the first suit states that the claim is under a deed of mortgage executed on the 1st of November, 1872, by the Defendants 1, 2, and 3, that Rs. 67,000 were borrowed of one *Bisheshur Pershad*, and that as security for that amount the Defendants mortgaged a 2-annas share out of 16 annas of talooka *Sunwani*. It then states that the debt due to *Bisheshur* was purchased under a sale in execution of a decree by the Plaintiff, who obtained a sale certificate, and thereby stood in the place of *Bisheshur*, and "that inasmuch as the *Sunwani* estate belonging to the Defendants is under the superintendence of the Court of Wards, and as the Collector of *Ghazipur* is the manager thereof

on behalf of the Court of Wards, the Collector has also been made a Defendant." The Plaintiff prays judgment for the amount claimed.

The plaint in the second suit is very similar. It is upon a mortgage bond for Rs.39,900, executed, on the 7th of March, 1874, by the same persons, to *Rai Narain Das* himself. This plaint also contains a statement that the *Sunwani* estate is under the control of the Court of Wards; and that therefore the Collector, who was in the management of it, is made Defendant.

A written statement was put in on behalf of the Court of Wards in the first suit, which stated, "That talooka *Sunwani* is the sole and exclusive property of *Masuma Bibi*," which is now admitted; and that she was a ward of the Court, and had no power to convey any portion of her estate by way of mortgage, that the property against which the Plaintiff seeks to enforce his lien belongs to No. 1 only,—that is, *Masuma Bibi*,—not to the other Defendants; and that the debt sued for was not borrowed with the consent or knowledge of the Court of Wards.

The material issues framed are, "Who is the proprietor of talooka *Sunwani*, and have *Nawab Mohamed Hosein Khan* and *Mussumat Said-ul-Nissa Begum* any interest in this talooka or the properties in dispute?" It is found they had not. "Was the proprietor of or were the persons who may be found to possess an interest in the property in dispute, legally competent to convey that property by mortgage or sale while the estate was under the superintendence and management of the Court of Wards?" "Is the Plaintiff, as auction purchaser of the deed of mortgage, competent to sue? Was the deed executed with the knowledge and consent of the Court of Wards? If the deed is not valid, are *Masuma Bibi*, *Said-ul-Nissa Begum*, and *Nawab Mahomed Hosein Khan*, or any of them, liable for the amount claimed, or for any other amount?"

The first suit was decided on what may be called a technical point. On issue 4 it was held that the Plaintiff was not the auction purchaser of the deed of mortgage, and therefore could not sue; and the decision was therefore against him. The Judge appears also to have found the other issues very much as they were found in the other case,

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With respect to the second suit the issues are very much the same, and the findings are in favour of the Defendants upon all the material issues. They are in their favour upon the issue that the Defendants, who may be reduced to one,—viz., *Masuma Bibi*,—were not competent to convey an interest in the property in dispute and that the deeds sued upon were not known to the Court of Wards. Under these circumstances, in the second case, the Judge of the first instance dismissed the suit as against the Collector of the Court of Wards and as against *Masuma Bibi*, but granted the relief claimed against the daughter and the son-in-law, who were not under the Court of Wards. The two judgments have been confirmed in every respect by the Court above, and the appeals are from the judgments of that Court.

It has been contended on the part of the Plaintiffs in the first place that the estate in question, which seems to have been a large estate, was not properly put under the jurisdiction of the Court of Wards, so as to destroy the power which *Masuma Bibi* would have had of charging it; secondly, that even assuming that it was, still that the conduct of the Court of Wards has been such in allowing her and her son-in-law to manage the estate as to hold them out to the public and to creditors as capable of charging it.

It now becomes necessary to refer to some of the provisions of Reg. LII. of 1803, by which the Court of Wards was established. By sect. 2, "The Board of Revenue is hereby constituted a Court of Wards for the superintendence of the persons and estates of zemindars and other actual proprietors of land paying revenue to Government who are or may be disqualified for the management of their own lands, in consequence of their coming under any of the descriptions of disqualified landholders specified in sect. 3 of this Regulation." Those disqualified landholders are in the first place females, who are treated as disqualified if so reported by the Board of Revenue, unless the Governor-General in Council declares them competent; and there is another class of disqualified landholders consisting of minors, idiots, lunatics, and persons of bad character. This Act provides in the first place only for the case of proprietors of lands paying revenue to the Government, but the 7th section goes further, and provides "that

it shall be competent to the Governor-General in Council to commit to the charge of the Court of Wards any estate paying revenue to Government, being the sole property of any disqualified person or of any two or more persons, both or all of whom may be disqualified, although the same shall not have descended to such person or persons in the regular course of inheritance ;” and then it goes on to say—“and also any lakheraj lands belonging to such proprietor or proprietors, whenever the same shall appear to him for the interests of Government and the proprietor or proprietors,” and so on. There are further provisions with respect to reports to be made to the Government, the appointment of a manager, and a number of details as to the duties of that manager, and the staff of assistants which he shall have, and so forth. Then by sect. 19 it is stated that the manager shall have “the exclusive charge of all lands, malguzarry or lakheraje, as well as of all houses, tenements, goods, money, and moveables of whatever nature belonging to the proprietor whose estates may be committed to his charge, excepting only the house wherein such proprietor may reside, the moveables wanted for his or her use, and the money allowed for the support of the proprietor”, &c. So that according to the provisions of this section is the Governor-General in Council, or the Lieutenant-Governor who now exercises his powers, is of opinion that it would be for the benefit of the public or the estate to include any lakheraj lands under the management of the Court of Wards, he may do so ; and then the whole estate and effects, real and personal, of the proprietor are vested in the Court of Wards.

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Undoubtedly, the evidence in this case is somewhat meagre and unsatisfactory as to the proceedings of the Court of Wards, both as to the circumstances under which they took possession of the estate and their dealings with it afterwards. What evidence there is consists mainly of what will be now referred to. It appears that on the 8th of October, 1868, the Collector of *Ghazipur* wrote a letter to the Commissioner of *Benares*, with a view, no doubt, of its being transmitted to the Board of Revenue, to this effect:—
“I have the honour to request that you will obtain the sanction of the Board of Revenue to my placing the estates of *Masuma Begum* and *Mussumat Saed-un-nissa Begum* (that is, the mother

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and the daughter) under the Court of Wards. These estates are held rent free ; they were granted on the usual fees to *Munshi Shariyat-ul-lah Khan* in A.D. 1784, for good services rendered by him, and have been in his family ever since. Lately, owing to the estates being in the hands of women, they have fallen into great disorder, large debts have accrued, and unless some steps are taken this fine property will, I fear, soon be split up and come into the possession of outsiders." He recommends accordingly, with a view to the preservation of the property, that it shall be taken into the custody of the Court of Wards. The next document is one of the 24th of February, 1869, in which the lady herself and her daughter pray that the estate may be put under the Court of Wards ; and they make a proposal for the payment of some revenue to the Government with a view of authorizing the Government to take that step. The next document is a letter, No. 1107, of the 18th of May, 1869, from Mr. *Simson*, Secretary to the Government of the *North-Western Provinces*, to the Secretary of the Board of Revenue, in which he says that he forwards an opinion of the Government Advocate on the proposal of the Board that the *Sunwani* talooka in pergunnah *Balia*, zillah *Ghazipur*, be placed under the management of the Court of Wards. Then he says : " I am to observe that to receive a small payment as land revenue simply for the purpose of bringing the property within Reg. LII. of 1803, is a proceeding to which the Lieutenant-Governor would have been unwilling to resort. But on a reference to the agents of the family who are now at *Allahabad*, it has been alleged by them that the family are in possession of a small assessed property. If this be the case, the Board are authorized to assume the property *Khalsa* and *Jogeer* under their control, as the Court of Wards." The Government, therefore, put the construction upon the 7th section, which has been before read, that if any part of the property pays Government revenue, then there is a power to include all the *lakheraj* property ; and this letter includes an opinion from the Government Advocate very much to the same effect.

We are informed incidentally of what was done by a letter of the 22nd of July, 1875, from the Secretary to the Government of the *North-Western Provinces* to the Secretary of the Board of

Revenue of the *North-Western Provinces* :—" In reply to your letter, dated the 24th of June last, I am directed to say that the Board have correctly interpreted the grounds on which the Government in G.O. No. 1107, dated the 18th of May, 1869"—which is the last letter referred to—"authorized the Board to assume charge of the *Sunwani* estate in the *Ghazipur* district as the Court of Wards, viz., on account of the incompetency of the proprietors to manage it." We have here, therefore, a statement that this estate was assumed on the ground of the incompetency of *Masuma Bibi*. Then the letter goes on to say :—" The orders as contained in Government Order No. 1107, dated the 18th of May, 1869, were made subject to the condition that some portion of the estate was assessed to revenue. The same condition was subsequently referred to in Government Order No. 1110"—which we have not—"dated the 20th of May, 1869. The Board, in their docket, No. 894"—which is not in the record—"dated the 18th of August, 1869, reported that the condition required to make the orders of 20th of May, 1869, absolute was satisfied." Then it goes on to say : "The proprietors are still deemed by the Government incompetent to manage their estate. The Board may therefore carry out their proposal to sell a portion of the talooka to discharge the debts contracted." We have from this letter information that the Government made some inquiries, and in the result were satisfied that *Masuma Bibi* had some rent-paying land, and if so, the condition under which they directed her estate to be put under the management of the Court of Wards was complied with ; and further it is here stated that the estate was put under the management of the Court of Wards because she was incompetent, and that she was so considered up to that time, namely, 1875. Their Lordships understand that the whole of *Masuma Bibi's* property, including a house in *Benares*, was taken under the management of the Court of Wards.

That being so, this case is distinguishable from a case which has been quoted from the 11th volume of *Moore's Indian Appeals*, page 468, in which under certain circumstances it was held that, although an estate was actually in possession of the Court of Wards, still the lady to whom it belonged, *Rutta Koer*, might be capable of contracting debts. The ground on which this case was decided

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appears from what is said in the judgment delivered by Sir *James Colvile*, at page 483 of the volume referred to : " The evidence in this case not only fails to shew that the necessary reports of the Collector and of the Board of Revenue were made ; it also, though not uniformly consistent, goes far to negative any intention on the part of the revenue authorities to treat *Rutta Koer* as a disqualified proprietor or a person incompetent to manage her affairs. It shews that when her title was attacked in 1855 they declined to act as a Court of Wards in its defence, but left her to sue or be sued as a person *sui juris*, on her own responsibility and at her own cost. It further shews that in 1856, and in the very month in which she is alleged to have executed the bond, they had taken all the necessary steps towards putting her into the full possession and enjoyment of the talook, as a proprietor competent to its management, on her entering into proper engagements for the payment of the Government revenue." In that case the estate had been put under the Court of Wards in the lifetime of the sister who was incompetent. It had come by inheritance to *Rutta Koer*, who, according to that part of the judgment which has been quoted, was not incompetent, and to whom the Board intended to transfer the estate, and would have done so but for the Mutiny. That case is altogether distinguishable from the present, where the Court of Wards did hold the lady to be incompetent ; where, so far from leaving her to sue and to be sued, they now take her part and protect her ; and further, where they have assumed the management and retain it to the present day, holding her to be incompetent.

It now remains to deal with what may be called the substantial case on the part of the Appellants. They say that, assuming that the estate was properly taken possession of by the Court of Wards under a proper power, still that the conduct of the Court of Wards when they had taken possession was such as to hold out *Masuma Bibi* to the world as capable of contracting, and that the Plaintiffs have been induced thereby to contract with her. It is said that the Court of Wards have not assumed possession of the property in the sense of taking the rents and profits at all, and that they have appointed no manager. Undoubtedly, as before observed, the evidence on these subjects is meagre, but their Lord-

ships by no means infer that the lady or her son-in-law and daughter have remained in possession of the rents and profits all along ; and with respect to a manager, whether or not a regular manager was appointed does not very clearly appear, but in the statement of the plaint the estate is said to be under the management of the Court of Wards, and appears undoubtedly in fact to have been so.

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The argument last adverted to appears to their Lordships not to have been set up in either of the Courts below. There is no issue addressed to it ; the judgment of the Court below is not addressed to it ; and even in the petition of appeal the point is not taken. There is, indeed, in the second ground of appeal, this statement : " The manner, the object for which, and the state of things under which the estate was brought under the management of the Court of Wards did not prevent the owner or owners of the estate from raising debt by the hypothecation of the estate." That refers to the object and the state of things under which the estate was brought under the management of the Court of Wards ; but it does not set up the case that the Court of Wards, after it was brought under their management, so conducted themselves as to render this lady competent. She having been incompetent when they took possession of the estate, could any conduct of theirs in the first place, render her competent ? in the second place, has their conduct been such that they are estopped, as it were, from disputing that she was competent ? Those seem to be the questions. Assuming, however, that those questions, though not distinctly raised in the issues or in the judgments of the Court, or in the grounds of appeal, could now be gone into, their Lordships are of opinion, that, as a matter of fact, no such case is made out on the part of the Appellants. It does indeed appear that the Court of Wards allowed this lady and her daughter and son-in-law more freedom of action than probably they ought to have had or than was consistent with the regulation which has been quoted. The circumstances under which they were permitted that liberty of action appear upon the record. In a petition of the 4th of January, 1872, by the son-in-law, who is called the Nawab of *Sunwani*, there is this statement : " The rent-free jagir of talooka *Sunwani* has been, at our request, placed under the management

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of the Court of Wards. Mr. *Nickels* holds a conditional deed of sale of the said property, the term of which has expired on the 4th of September, 1871. As it is impossible to liquidate the debt without raising a fresh loan, which we have arranged for with certain bankers of *Benares*, who have already paid into the *Bank of Bengal* a sum more than covering the debt in question, we are therefore placed under the necessity of asking your written permission"—this is, of the Court of Wards—"for contracting the mortgage loan, so that we may be enabled to complete the requisite transaction with the bankers, and the property be thereby saved from the liability of the deed of conditional sale. Petitioners pray for the issue of early orders, as they will be put to great expense for payment of interest pending receipt of permission." That petition is considered, and this Order is made: "Forward a copy of this letter to *Masuma Begum*, and request her to arrange that the money required for liquidation of the debt as claimed by Mr. *Smythe*, attorney for *Nickels*, may be at once deposited in the *Bank of Bengal*." It appears then that for the purpose of liquidating a debt of large amount to Mr. *Nickels*,—incurred antecedently to the assumption of the estate by the Court of Wards,—the power was given to borrow considerable sums of money, a power which probably ought not to have been given; but at the same time it is clear from the petition that the Petitioner recognised the estate as being under the Court of Wards, and was fully sensible that without express written permission from them no transaction of the kind could be effected. Probably the Court in granting this permission acted under sect. 23 of Reg. LII. of 1803, in which, among other things, it is said: "The circumstances of all such debts,"—that is, antecedent debts,—“however, shall be immediately reported to the Collector, and by him without delay to the Court of Wards, with his sentiments on the best mode of satisfying the same, for their instructions, previous to any payment being made by the manager in discharge of them." It would seem that the Court thought that the best mode of dealing with this debt, incurred antecedently to their jurisdiction over the estate, was to allow the lady herself and her daughter and son-in-law to contract fresh loans. Upon this permission they did contract them, and it appears that

they entered into four bonds, one of them in favour of the present Plaintiff, *Rai Narain Das*, dated the 25th of January, 1872, for Rs.17,000, and three others to other persons whose names are not material. The terms of these bonds are set out, and it appears that in the bond given to this Plaintiff, there is this statement: "That as the talooka *Sunwani* was held by the Court of Wards, they were forbidden by law to borrow debt without the sanction of the Court; they had obtained a written permission of the Commissioner, and executed the deed of simple mortgage." Thereupon the present Plaintiff advances this money, and receives a bond, for the purpose of paying off an antecedent debt, which debt is paid off, and the Plaintiff is paid also; and on the face of this bond he has express notice that there is no power on the part of the lady to contract without the written permission of the Court of Wards, which has been given. That being so, when we come to the mortgage on which he sues,—and we are here dealing with the mortgage given to himself,—this previous mortgage to him is recited, which contains a statement of the want of power in the lady to contract. He had, therefore, express notice when he entered into the mortgage of the 4th of March, 1874, that she was acting without authority, and when he took it he certainly took the chance which every man must do who deals with a person who he knows has no authority to contract.

It appears, then, to their Lordships that the giving on the part of the Court of Wards, whether prudently or not, of this limited authority to raise loans for the purpose of paying antecedent debts, was not such a holding out to the world of the competency of *Masuma Bibi*, and her daughter and son-in-law, as would induce any reasonable person to suppose that they had the power to contract debts; and that even if it were so, the Plaintiff at all events knew the true state of the case.

The case against *Rai Narain Das* on the second bond on which he sues is perhaps somewhat stronger than that on the first, because the first was given to *Bisheshur*; and the question would be what knowledge *Bisheshur* had. But when their Lordships consider the necessary notoriety of a large estate being put under the management of the Court of Wards, when they consider further that express notice was given to all creditors of the estate being under

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the management of the Court of Wards as early as December, 1869, that part of the estate was in *Benares* and that the family resided in *Benares*, and that *Bisheshur* was a banker of *Benares*, they cannot doubt that he must have been perfectly well aware, as *Rai Narain Das* himself must also have been, that this lady had not the power to contract.

Under these circumstances their Lordships are of opinion that the judgment in the second case, that of the bond of the 4th of March, 1874, is right.

With respect to the first case, their Lordships think the judgment dismissing the suit on the ground that the Plaintiff was not the purchaser of *Bisheshur's* mortgage, on the ground of the sale being irregular, and of the Court not having jurisdiction to execute the decree, was wrong. The irregularities referred to, if they existed, were cured by the certificate of sale; and though the Court may not have had jurisdiction to attach lands out of its district, it had jurisdiction to sell in execution the right to enforce the bond. But for the reasons which they have given with respect to the second case, they are of opinion that the judgment ought to have been the same as in that case, that is, a judgment dismissing the suit against the lady and against the Court of Wards, but giving it effect against the daughter and her husband. The judgment in the first case must be so far modified.

In the result their Lordships will therefore humbly advise Her Majesty that in Appeal No. 121 of 1878, the decree of the High Court of the 26th of May, 1879, ought to be affirmed so far as it relates to *Mussumat Masuma Bibi* and the Collector of *Ghazipur*, on behalf of the Court of Wards, and to the property alleged to have been mortgaged, and to be reversed as to the other Defendants; and that it be declared that *Mussumat Said-un-Nissa* and *Nawab Mohamed Hossein Khan* are liable to pay the amount of principal and interest due on the bond in original suit No. 4 of 1878, such interest to be computed at the rate of nine annas per cent. per mensem from the date of the bond to the date of the Order of Her Majesty on this report, and at the rate of 6 per cent. from the date of the Order to that of payment; that the case be remitted to the High Court with directions to cause the principal and interest to be computed in accordance with the

above directions. And that in Appeal No. 122 of 1878, the decree of the High Court ought to be affirmed.

The Appellant must pay to the Collector of *Ghazipur* on behalf of the Court of Wards, his costs of these appeals to Her Majesty in Council, after deducting therefrom the costs of the Appellant caused by the opposition to the motion to consolidate the appeals.

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Solicitor for the Appellant : *T. L. Wilson.*

Solicitor for the Respondent the Collector of *Ghazipur* :
H. Treasure.

MISIR RAGHOBARDIAL PLAINTIFF;

AND

RAJAH SHEO BAKSH SINGH DEFENDANT.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

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June 29 ;
July 15.

Res judicata—Act X. of 1877, sect. 13.

The words "Court of competent jurisdiction" in sect. 13 of Act X of 1877, mean a Court which has jurisdiction over the matter in the subsequent suit in which the decision is used as conclusive ; in other words, a Court of concurrent jurisdiction, i.e., concurrent as regards the pecuniary limit as well as the subject-matter.

In a suit for principal (Rs. 12,000) and interest upon a bond brought in the Court of a Deputy Commissioner, it was pleaded that in a suit for interest only brought in the Court of an Assistant Commissioner, it had been held that Rs. 4790, and not Rs. 12,000, was the amount of principal and interest which had been decreed thereon accordingly :—

Held, that this was not *res judicata* as regards the principal amount of the bond. The pecuniary limit of the Assistant Commissioner's jurisdiction being Rs. 5000 he could not effectually bind the Plaintiff as regards the amount of the bond.

APPEAL from an order of the Judicial Commissioner of *Oudh* (Nov. 22, 1879), affirming an order of the Deputy Commissioner of *Sitapur* (Feb. 25, 1879), whereby the Appellant's suit was dismissed on the ground that it was barred as *res judicata* under sect. 13 of Act X. of 1877.

**Present* :—SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

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The facts of the case are stated in the judgment of their Lordships.

The suit was brought on the 7th of December, 1878, in the Court of the Deputy Commissioner of *Sitapur* to recover the principal sum of Rs. 12,000 due on a bond dated November, 21, 1875, and executed by the Respondent, and a sum of Rs. 2435 interest due on that amount from the 21st of October, 1877, to the 7th of December, 1878.

For the defence it was contended that under the circumstances stated in their Lordships' judgment the suit ought to be dismissed as barred by s. 13 of Act X. of 1877, and an issue was framed to that effect.

Both Courts gave judgment in favour of the Respondent; that of the Judicial Commissioner being to the following effect:—

“On the 7th of December, 1878, the Plaintiff, Appellant, instituted the present suit by a plaint in which he alluded to the previous suit for interest, and order of dismissal against which his undecided appeal was then pending, and reciting that twelve separate instalments had become due since the 20th of October, 1877, and that the principal sum with all interest according to the bond had become due on the 20th of November, 1877, and he prayed for a decree for Rs. 14,435. 10*a*. principal, and interest and other sums subsequently accruing.

“The Deputy Commissioner found that the decisions in the former case were by a competent Court, and had settled, as between these parties, the issue that only Rs. 4790 of the principal sum mentioned in the bond had been paid and received, the payment of consideration having been substantially and directly in issue in the former suit. He therefore dismissed the claim.

“The Plaintiff appealed, but as Colonel *MacAndrew*, who decided the former suit, was still presiding over the Divisional Appellate Court, the Appellant moved this Court to transfer the appeal to some other competent Court under sect. 25 of Act X of 1877. And on the 21st of June, 1879, this Court, with reference to sect. 32 of Act XXXII of 1871, transferred the case to its own file, and the appeal has now been heard.

“It is urged that, though the Assistant Commissioner in the former suit had jurisdiction in respect to the interest then claimed

and it was proper that he should incidentally go into the question, whether the bond was genuine and valid, yet he could not decide on the bond itself, and his decision would only affect the issue as to interest. The money value of the bond would entirely prevent his having jurisdiction in respect to it, and neither the action nor consent of parties can give any Court jurisdiction when by statute the Court has it not.

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"In this case, to use the words in *Archard v. Norman*(1), quoted in *Sukee Monee Debia v. Huree Mohun Mookerjee*, and others, of the 21st of July, 1866 (2), on which both parties rely, "to prove the interest due it was necessary to prove the debt;" and the amount of that debt was beyond the jurisdiction of the Court of the Assistant Commissioner under sect. 11, Act XXXII. of 1871, so that the Lower Court might say, "before I can hear the case I must be satisfied that the principal is due, I must inquire if there is a sum of Rs.12,000 owing, and that at once ousts the Court of its jurisdiction," which only extends to suits where the amount or value does not exceed Rs.5000—five thousand.

"But the decision of the High Court, *Calcutta*, was that the true test is: Is the sum payable and demanded in the action within the Court's jurisdiction as to amount?

"And in this case the sum demanded was within the Court's jurisdiction, and the principal sum could not be recovered at that time.

"In my opinion it would have been better if the Commissioner, on the 9th of March, 1878, had not remanded the case to the Assistant Commissioner, but it must be remembered that this order was made on the appeal of the plaintiff then and now Appellant. And I cannot say that it conferred on the Assistant Commissioner a jurisdiction which he had not, and is therefore void, for the High Court, in the above quoted case, have affirmed that the view taken by the referring officer was correct, and that view was that 'Whatever the amount of the bond, and whatever may be the line of defence adopted,' if the sum sought to be recovered does not exceed the Lower Court's jurisdiction as to amount it has jurisdiction in the matter.

"Both the Court of the Assistant Commissioner and that of the

(1) I. C. C. Chron. 38.

(2) 6 Suth. W. R. Civil References, p. 6.

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Commissioner had concurrent jurisdiction as to description of the matter to be adjudicated, though the Lower Court's original jurisdiction was restricted by certain pecuniary limits.

"This is a very different case to No. 374 of 1865, *Mussumat Edun v. Mussumat Bechun* (1), which decided that when a Collector's rent Court ruled as to the genuineness of a bond pleaded as a set-off to a demand for rent, the ruling was not conclusive, because he had not jurisdiction in respect to such a description of suit as the genuineness of a bond, although his ruling as to rent due was conclusive, and for the purpose of determining that, he had the power to enter into the question whether the bond was genuine or not, and although the amount of the bond was within the pecuniary limits of his jurisdiction.

"The question of the genuineness of the bond and its validity having thus been put directly and substantially in issue between these parties before a Court of competent jurisdiction to decide the cause before it, it was heard and it was determined against the present Appellant, and that decision was upheld in appeal by a judgment which admittedly has become final, and I must find that no Court had power again to try that issue. Such procedure is prohibited by sect. 13, Act X. of 1877."

Leith, Q.C., and *C. W. Arathoon*, for the Appellant, contended that this suit was not barred under the section in question. The former suit was for a balance of interest, Rs.1665, in a Court the limit of whose jurisdiction was Rs.5000. That Court's jurisdiction was not competent to decide the question which arises in this. The jurisdiction was not concurrent with the Deputy Commissioner as regards pecuniary limit, and although it incidentally decided as to the amount of the bond, it could not usurp jurisdiction to give a binding decision upon that question so as to deprive a competent Court of the power to try it. Reference was made to *Sukee Monee Debia v. Huree Mohun Mookerjee* (2); *Mussumat Edun v. Mussumat Bechun* (1); *Anantha Naraiyanappaiyan v. Ganapaty Aiyar and others* (3); *Aradhun Dey v. Golam*

(1) 8 Suth. W. R. C. R. 175, &c. (2) 6 Suth. W. R. Civil References, p. 6.

(3) 2 Madras, H. C. R. 469.

Hossein (1); *Mohima Chunder Chuckerbutty v. Rajcoomar Chuckerbutty* (2); *Barrs v. Jackson* (3); *The Duchess of Kingston's Case*, and notes thereto (4); *Chunder Coomar Mundul v. Nunnee Khanum and others* (5).

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The Respondent did not appear.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH :—

The suit which is the subject of this appeal was brought upon a bond, dated the 21st of Novemeber, 1875, given by the Respondent for Rs. 12,000, stated therein to have been borrowed from the Appellant, the principal to be repaid within three years, and interest to be paid monthly at the rate of Rs. 1. 8a. per cent. per month. The three years having expired, the plaint was filed on the 7th of December, 1878, in the Court of the Deputy Commissioner of *Sitapur*. The Defendant (the now Respondent) pleaded "want of consideration, and that in a previous suit for Rs. 1665, interest on this bond, the issue regarding consideration was decided in favour of Defendant, the Court deciding that Defendant had received only Rs. 4790 and not Rs. 12,000," which decision was upheld on appeal. Upon this a preliminary issue was framed by the Court as follows:—"Is the issue regarding consideration a *res judicata* (Sect. 13, Act. X of 1877) between "the parties?" The decision of the Deputy Commissioner upon this issue was in favour of the Defendant, and judgment was given for the balance found to be due of the principal sum of Rs. 4790 and the interest thereon. From this decree there was an appeal by the Plaintiff to the Judicial Commissioner of *Oudh*, who dismissed it, and the Plaintiff has appealed to Her Majesty in Council from that dismissal.

The suit for interest was brought in December, 1877, in the Court of the Assistant Commissioner of *Sitapur*, it being alleged that Rs. 4140 was due for interest on a bond for Rs. 12,000, and it being admitted that the Defendant had paid Rs. 2475, the balance

(1) 8 *Suth. W. R.* 487.

(2) 10 *Suth. W. R.* 22.

(3) 1 *Phillips Ch.* 582.

(4) 2 *Sm L. C. notes*, 778.

(5) 11 *Beng. L. R.* 434.

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of Rs. 1665 was claimed. The jurisdiction of the Assistant Commissioner was limited to suits where the amount or value of the subject-matter did not exceed Rs. 5000, and the Defendant objected that, if the Plaintiff insisted on the validity of the bond, the case could not be tried before him. The Assistant Commissioner held that the case was beyond his jurisdiction, but upon an appeal to the Commissioner, his order dismissing the suit was cancelled, and it was remanded for trial on the merits. The case was then tried by the Extra Assistant Commissioner, and evidence having been given on both sides, he found that the principal sum due on the bond was Rs. 4790, and that the Plaintiff was entitled to interest thereon, and the Plaintiff having admitted the receipt of Rs. 2475 on account of interest, which exceeded the sum he found to be due for interest by Rs. 822. 7*a.* 9*p.*, he dismissed the suit. An appeal from this decision to the Commissioner was dismissed, and an application made to the Judicial Commissioner to allow an appeal from that order was rejected by him.

The question now before their Lordships depends upon the construction of sect. 13 of Act X. of 1877. Before considering that question, it will be well to refer to the state of the law in *India* when that Act was passed. Sect. 2 of Act VIII. of 1859, the Code of Civil Procedure for which Act X. of 1877 was substituted, provided that the Civil Courts should not take cognizance of any suit brought on a cause of action which should have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties or between parties under whom they claim. It is clear that this section would not have applied to the present case, the causes of action in the two suits—the non-payment of interest in one and the non-payment of principal in the other—being different. In fact, when the first suit was brought the cause of action in the second had not arisen. But independently of this provision in the *Code of Procedure*, the Courts in *India* have adopted the rule laid down in the *Duchess of Kingston's Case* (1), and have applied it in a great number of cases. It was recognised as the law in *India* by this Board in *Khugowlee Singh v. Hossein Bux Khan* (2), where, after quoting the passage in the *Duchess of Kingston's Case* (1) in which the rule is stated,

(1) 2 Smith's L. C. 760.

(2) 7 Bengal Law Rep. 673.

their Lordships say, "There is nothing technical or peculiar to the law of *England* in the rule as so stated. It was recognised by the Civil Law, and it is perfectly consistent with the 2nd section of the *Code of Procedure*, under which this case was tried."

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Mussumat Edun v. Mussumat Bechun (1) may be referred to as the leading case on this subject. In that case the Chief Justice, Sir *Barnes Peacock*, held that the two Courts must be Courts of concurrent jurisdiction, and "in order to make the decision of one Court final and conclusive in another Court, it must be a decision of a Court which would have had jurisdiction over the matter in the subsequent suit in which the first decision is given in evidence as conclusive." As to what is a Court of concurrent jurisdiction, it is material to notice that there is in *India* a great number of Courts, that one main feature in the Acts constituting them is that they are of various grades with different pecuniary limits of jurisdiction, and that by the *Code of Procedure* a suit must be instituted in the Court of the lowest grade competent to try it. For instance, in *Bengal*, by the *Bengal Civil Courts Act*, No. VI. of 1871, the jurisdiction of a munsif extends only to original suits in which the amount or value of the subject matter in dispute does not exceed Rs.1000. The qualifications of a munsif and the authority of his judgment would not be the same as those of a district or of a subordinate judge, who have jurisdiction in civil suits without any limit of amount. In their Lordships' opinion it would not be proper that the decision of a munsif upon (for instance) the validity of a will or of an adoption in a suit for a small portion of the property affected by it should be conclusive in a suit before a district judge or in the High Court for property of a large amount, the title to which might depend upon the will or the adoption. Other similar cases are mentioned in the judgment of the Chief Justice. It is true that there is an appeal from the munsif's decision, but that upon the facts would be to the District Court and not to the High Court. And that the decision should be conclusive would be still more improper as regards many other of the various Courts in *India*, the qualifications of whose Judges differ greatly. By taking concurrent jurisdiction to mean concurrent as regards the pecuniary limit as well as the

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subject matter, this evil or inconvenience is avoided ; and although it may be desirable to put an end to litigation, the inefficiency of many of the Indian Courts makes it advisable not to be too stringent in preventing a litigant from proving the truth of his case. It appears to their Lordships that if this case had arisen before the passing of Act X. of 1877, the High Courts in *India* would have rightly held that the decision of the Extra Assistant Commissioner in the first suit was not conclusive as to the amount of the principal sum due on the bond.

Sect. 13 of Act X. of 1877 is as follows :—

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been heard and finally decided by a Court of competent jurisdiction, in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title.”

The intention seems to have been to embody in the *Code of Procedure*, by sects. 12 and 13, the law then in force in *India*, instead of the imperfect provision in sect. 2 of Act VIII of 1859. And, as the words of the section do not clearly shew an intention to alter the law, their Lordships do not think it right to put a construction upon them which would cause an alteration.

The first suit was for Rs. 1665, for interest only, the principal not being then due, and the matter in issue was whether that sum was due. The Plaintiff alleged that it was for interest on a bond for Rs. 12,000, which the Defendant denied, and thus an issue was raised as to the consideration for the bond, but this was a collateral rather than a direct issue in the suit. The Plaintiff might have succeeded without having a finding upon it if he had proved an admission by the Defendant that the sum claimed was due for interest, or had shewn that the Rs. 2475 had been expressly paid on account of the larger sum which he said the Defendant owed for interest. If the decision of the Assistant Commissioner is conclusive he will, although he could not have tried the question in a suit on the bond, have bound the Plaintiff as effectually as if he had jurisdiction to try that suit. Their Lordships think this was not intended, and that by Court of competent jurisdiction Act X. of 1877 means a Court which has jurisdiction over the matter in the subsequent suit in which the decision is used as

conclusive, or in other words, a Court of concurrent jurisdiction. In the judgment delivered by this Board in *Khagowlee Singh v. Hossein Bux Khan* (1), it said that the *eadem causa petendi* and judgment of a Court of competent or concurrent jurisdiction were both wanting in that case. This seems to shew what was considered to be a competent Court. Their Lordships think that sect. 13 of Act X of 1877 should be so construed, and consequently they will humbly advise Her Majesty that the orders of both the Lower Courts should be reversed, and the suit be remanded for trial on the merits. The Respondent will pay the costs of this appeal.

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Solicitor for the Appellant : *T. L. Wilson.*

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ACT XXXVI OF 1858 : See ILLEGAL ARREST AND DETENTION.

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CONTRACT OF SURETYSHIP.] In a suit to recover moneys which the Plaintiff had been compelled to pay upon the Defendants' breach of contract with the independent State of *Bhawalpur*, the Defendants pleaded that there had been no breach within the meaning of the contract of suretyship. It appeared that the whole arrangement had been made within the State of *Bhawalpur*, the authorities of which had put an end to the contract and enforced payment by the Plaintiff :—*Held*, that the parties must be considered to have contracted according to the liabilities that would be incurred at *Bhawalpur*, and not with a view to the law of *British India*,

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GHATWALI TENURES—*continued.*

heir, the plaintiff having been moreover appointed thereto by the Government :—*Held*, that they were not liable to be seized in execution of a decree against the father as assets by descent in the hands of the plaintiff, his son.—Such tenures are not resumable by the zemindar or by the Government. They are not transferable, nor saleable in execution of a decree, nor divisible. Though hereditary they are not governed by the ordinary rules of inheritance, under the Hindu or Mahomedan law, and are subject to the condition of the Government's approval of the heir.—*Rajah Lelanund Sing v. Government of Bengal* (6 Moore's Ind. Ap. Ca. 101) approved. **RAJAH NILMONI SINGH v. BAKRANATH SINGH** - 104

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MITAKSHARA LAW.] *Held*, that the interest which the Defendant took by heritage from his father in an impartible zemindary was liable as assets by descent for the payment of his father's debts. *Girdhari Lall v. Kantoo Lall* (Law Rep. 1 Ind. Ap. 321) approved and declared applicable to the *Madras Presidency* :—*Held*, further, that a zemindary to which a Hindu succeeds by inheritance to his maternal grandfather is not his self-acquired property ; but, *quaere*, whether he is under the same restrictions as to the alienation, or hypothecation thereof as he would have been if it had descended to him from his father or paternal grandfather. **MUTTAYAN CHETTIAR v. SANGILI VIRA PANDIA CHINNATAMBIAR** - 128

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REGULATION LII of 1803.] Where an estate has been properly taken possession of by the Court of Wards under a proper power on behalf of its ward, the latter is incompetent to bind the same by debts or alienation thereof.—*Mohummud Zahoor Ali Khan v. Mussumat Thakoorance Koer* (11 Moore's Ind. Ap. Ca. 468) distinguished.—Where the said Court has given to its wards, whether prudently or not, a limited authority to raise loans for the purpose of paying antecedent debts, *held*, that that is not such a holding out to the world of the competency of such wards as would induce any reasonable person to suppose that they had power to contract debts. **RAI BALKRISHNA v. MUSSUMAT MASUMA BIBI** . 182

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